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Advisory Committee on Criminal Jury Instructions

Hon. Peter J. Siggins, *Chair*

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A. BRIBERY OF OFFICIAL

2600. Giving or Offering a Bribe to an Executive Officer (Pen. Code, § 67)

The defendant is charged [in Count _____] with (giving/ [or] offering) a bribe to an executive officer [in violation of Penal Code section 67].

To prove that the defendant is guilty of this crime, the People must prove that:

1. The defendant (gave/ [or] offered) a bribe to an executive officer in this state [or someone acting on the officer's behalf];

AND

2. The defendant acted with the corrupt intent to unlawfully influence that officer's official (act[,]/ decision[,]/ vote[,]/ opinion[,]/ [or] _____ <insert description of alleged conduct in other proceeding>).

As used here, *bribe* means something of present or future value or advantage, or a promise to give such a thing, that is given or offered with the corrupt intent to unlawfully influence the public or official action, vote, decision, [or] opinion, [or] _____ <insert description of alleged conduct at other proceeding>] of the person to whom the bribe is given.

A person acts with *corrupt intent* when he or she acts to wrongfully gain a financial or other advantage for himself, herself, or someone else.

The official (act[,]/ decision[,]/ vote[,]/ opinion[,]/ [or] proceeding) the defendant sought to influence must have related to an existing subject that could have been brought before the public officer in his or her official capacity. It does not have to relate to a duty specifically given by statute to that officer.

An *executive officer* is a government official who may use his or her own discretion in performing his or her job duties. [(A/An) _____ <insert title, e.g., police officer, commissioner, etc.> is an executive officer.]

[The executive officer does not need to have (accepted the bribe[,]/ [or] performed the requested act[,]/ [or] deliberately failed to perform a duty).]

[*Offering a bribe* does not require specific words or behavior, as long as the language used and the circumstances clearly show an intent to bribe. [The thing offered does not need to actually be given, exist at the

time it is offered, or have a specific value.]]

New January 2006

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

The statute applies to giving or offering a bribe to “any executive officer . . . with intent to influence him in respect to any act, decision, vote, opinion, or other proceeding as such officer” It is unclear what “other proceeding” refers to and there are no cases defining the phrase. If the evidence presents an issue about attempting to influence an officer in any “other proceeding,” the court may insert a description of the proceeding where indicated.

Give the bracketed sentence that begins with “The executive officer does not” if the evidence shows that the executive officer did not accept the bribe or follow through on the action sought.

Give the bracketed definition of “offering a bribe” if the prosecution is pursuing this theory. Give the bracketed sentence that begins, “The thing offered does not need to actually,” on request.

AUTHORITY

- Elements. Pen. Code, § 67.
- Bribe Defined. Pen. Code, § 7(6).
- Corruptly Defined. Pen. Code, § 7(3).
- Executive Officer Defined. *People v. Strohl* (1976) 57 Cal.App.3d 347, 361 [129 Cal.Rptr. 224].
- Corrupt Intent Is an Element of Bribery. *People v. Gliksman* (1978) 78 Cal.App.3d 343, 351 [144 Cal.Rptr. 451]; *People v. Zerillo* (1950) 36 Cal.2d 222, 232 [223 P.2d 223].
- Subject Matter of Bribe. *People v. Megladdery* (1940) 40 Cal.App.2d 748, 782 [106 P.2d 84], disapproved on other grounds in *People v. Posey* (2004) 32 Cal.4th 193, 214–215 [8 Cal.Rptr.3d 551, 82 P.3d 755] and *People v. Simon* (2001) 25 Cal.4th 1082, 1108 [108 Cal.Rptr.2d 385, 25 P.3d 598]; *People v. Diedrich* (1982) 31 Cal.3d 263, 276 [182 Cal.Rptr. 354, 643 P.2d 971].
- Offering a Bribe. *People v. Britton* (1962) 205 Cal.App.2d 561, 564 [22 Cal.Rptr. 921].
- Bribery and Extortion Distinguished. *People v. Powell* (1920) 50 Cal.App. 436, 441 [195 P. 456].
- No Bilateral Agreement Necessary. *People v. Gliksman* (1978) 78 Cal.App.3d 343, 350–351 [144 Cal.Rptr. 451].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Governmental Authority, §§ 32–55.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 141, *Conspiracy, Solicitation, and Attempt*, § 141.10 (Matthew Bender).

RELATED ISSUES***Entrapment***

The crime is complete once an offer is made. Accordingly, subsequent efforts to procure corroborative evidence do not constitute entrapment. (*People v. Finkelstein* (1950) 98 Cal.App.2d 545, 553 [220 P.2d 934]; *People v. Bunkers* (1905) 2 Cal.App. 197, 209 [84 P. 364].)

Accomplice Liability and Conspiracy

The giver and the recipient of a bribe are not accomplices of one another, nor are they coconspirators, because they are guilty of distinct crimes that require different mental states. (*People v. Wolden* (1967) 255 Cal.App.2d 798, 804 [63 Cal.Rptr. 467].)

Extortion Distinguished

Extortion is bribery with the additional element of coercion. Accordingly, the defendant cannot be guilty of receiving a bribe and extortion in the same transaction. (*People v. Powell* (1920) 50 Cal.App. 436, 441 [195 P. 456].)

**2601. Giving or Offering a Bribe to a Ministerial Officer (Pen.
Code, § 67.5)**

The defendant is charged [in Count _____] with (giving/ [or] offering) a bribe to a (ministerial officer/government employee/government appointee) [in violation of Penal Code section 67.5].

To prove that the defendant is guilty of this crime, the People must prove that:

1. The defendant (gave/ [or] offered) a bribe to (a/an) (ministerial officer/employee/appointee) of the (State of California/City of _____ <insert name of city>/County of _____ <insert name of county>/ _____ <insert name of political subdivision from Pen. Code, § 67.5>) [or to someone acting on the (officer's/ employee's/appointee's) behalf];

AND

2. The defendant acted with the corrupt intent to unlawfully influence that (officer's/employee's/appointee's) official (act[,]/ decision[,]/ vote[,]/ opinion[,]/ [or] _____ <insert description of alleged conduct in other proceeding>).

As used here, *bribe* means something of present or future value or advantage, or a promise to give such a thing, that is given or offered with the corrupt intent to unlawfully influence the public or official action, vote, decision, or opinion of the person to whom the bribe is given.

A person acts with *corrupt intent* when he or she acts to wrongfully gain a financial or other advantage for himself, herself, or someone else.

The official (act[,]/ decision[,]/ vote[,]/ opinion[,]/ [or] proceeding) the defendant sought to influence must have related to an existing subject that could have been brought before the (officer/employee/appointee) in his or her official capacity. It does not have to relate to a duty specifically given by statute to that (officer/employee/appointee).

[A *ministerial officer* is an officer who has a clear and mandatory duty involving the performance of specific tasks without the exercise of discretion.]

[The (officer/employee/appointee) does not need to have (accepted the bribe[,]/ [or] performed the requested act[,]/ [or] deliberately failed to perform a duty).]

[*Offering a bribe* does not require specific words or behavior, as long as the language used and the circumstances clearly show an intent to

bribe. [The thing offered does not need to actually be given, exist at the time it is offered, or have a specific value.]]

New January 2006; Revised February 2012

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

If the defendant is charged with a felony based on the value of the item offered or given (Pen. Code, § 67.5(b)), give CALCRIM No. 2602, *Giving or Offering a Bribe to a Ministerial Officer: Value of Thing Offered*.

Give the bracketed sentence that begins with “The (officer/employee/appointee) does not” if the evidence shows that the officer did not accept the bribe or follow through on the action sought.

Give the bracketed definition of “offering a bribe” if the prosecution is pursuing this theory. Give the bracketed sentence that begins, “The thing offered does not need to actually,” on request.

AUTHORITY

- Elements. Pen. Code, § 67.5.
- Bribe Defined. Pen. Code, § 7, subd. 6.
- Corruptly Defined. Pen. Code, § 7, subd. 3.
- Grand Theft Defined. Pen. Code, § 487.
- Ministerial Officer Defined. Gov. Code, § 820.25(b); *People v. Strohl* (1976) 57 Cal.App.3d 347, 361 [129 Cal.Rptr. 224].
- Corrupt Intent Is an Element of Bribery. *People v. Gliksman* (1978) 78 Cal.App.3d 343, 351 [144 Cal.Rptr. 451]; *People v. Zerillo* (1950) 36 Cal.2d 222, 232 [223 P.2d 223].
- Subject Matter of Bribe. *People v. Megladdery* (1940) 40 Cal.App.2d 748, 782 [106 P.2d 84], disapproved on other grounds in *People v. Posey* (2004) 32 Cal.4th 193, 214–215 [8 Cal.Rptr.3d 551, 82 P.3d 755] and *People v. Simon* (2001) 25 Cal.4th 1082, 1108 [108 Cal.Rptr.2d 385, 25 P.3d 598]; *People v. Diedrich* (1982) 31 Cal.3d 263, 276 [182 Cal.Rptr. 354, 643 P.2d 971].
- Offering a Bribe. *People v. Britton* (1962) 205 Cal.App.2d 561, 564 [22 Cal.Rptr. 921].
- Bribery and Extortion Distinguished. *People v. Powell* (1920) 50 Cal.App. 436, 441 [195 P. 456].
- No Bilateral Agreement Necessary. *People v. Gliksman* (1978) 78 Cal.App.3d 343, 350–351 [144 Cal.Rptr. 451].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Governmental Authority, §§ 32–55.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 141, *Conspiracy, Solicitation, and Attempt*, § 141.10 (Matthew Bender).

LESSER INCLUDED OFFENSES

If the defendant is charged with a felony based on the value of the item offered or given (Pen. Code, § 67.5(b)), then the misdemeanor is a lesser included offense (Pen. Code, § 67.5(a)). The court must provide the jury with a verdict form on which the jury will indicate if the prosecution has proved that the thing offered was worth more than \$950 or was something that if stolen would qualify as grand theft. If the jury finds that this allegation has not been proved, then the offense should be set at a misdemeanor.

RELATED ISSUES

See the Related Issues section of CALCRIM No. 2600, *Giving or Offering a Bribe to an Executive Officer*.

**2602. Giving or Offering a Bribe to a Ministerial Officer:
Value of Thing Offered (Pen. Code, § 67.5(b))**

If you find the defendant guilty of (giving/ [or] offering) a bribe to a (ministerial officer/government employee/government appointee), you must then decide whether the People have proved the additional allegation that the defendant (gave/ [or] offered) the (officer/employee/appointee) (something worth more than \$950/ _____ <insert other item from Pen. Code, § 487>).

The People have the burden of proving this allegation beyond a reasonable doubt. If the People have not met this burden, you must find that this allegation has not been proved.

New January 2006; Revised February 2012

BENCH NOTES

Instructional Duty

If the defendant is charged with a felony based on the value of the item offered or given (Pen. Code, § 67.5(b)), the court has a **sua sponte** duty to instruct on this sentencing factor.

This instruction **must** be given with CALCRIM No. 2601, *Giving or Offering a Bribe to a Ministerial Officer*.

The court must provide the jury with a verdict form on which the jury will indicate if the alleged sentencing factor has or has not been proved.

AUTHORITY

- Enhancement. Pen. Code, § 67.5(b).

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Governmental Authority, §§ 32–55.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 141, *Conspiracy, Solicitation, and Attempt*, § 141.10 (Matthew Bender).

2603. Requesting or Taking a Bribe (Pen. Code, §§ 68, 86, 93)

The defendant is charged [in Count _____] with (requesting[,]/ taking[,]/ [or] agreeing to take) a bribe [in violation of _____ <insert appropriate code section[s]>].

To prove that the defendant is guilty of this crime, the People must prove that:

1. The defendant was (a/an) (executive officer/ministerial officer/ employee/appointee/legislative officer/judicial officer) of the (State of California/City of _____ <insert name of city>/County of _____ <insert name of county>/ _____ <insert name of political subdivision from Pen. Code, § 68>);
2. The defendant (requested[,]/ took[,]/ [or] agreed to take) a bribe;
3. When the defendant (requested[,]/ took[,]/ [or] agreed to take) the bribe, (he/she) represented that the bribe would unlawfully influence (his/her) official (act[,]/ decision[,]/ vote[,]/ [or] opinion). The representation may have been express or implied;

AND

4. The defendant acted with the corrupt intent that (his/her) public or official duty would be unlawfully influenced.

As used here, *bribe* means something of present or future value or advantage, or a promise to give such a thing, that is requested or taken with the corrupt intent that the public or official action, vote, decision, or opinion of the person to who is requesting, taking, or agreeing to take the bribe, will be unlawfully influenced.

A person acts with *corrupt intent* when he or she acts to wrongfully gain a financial or other advantage for himself, herself, or someone else.

[An *executive officer* is a government official who may use his or her own discretion in performing his or her job duties. [A _____ <insert title, e.g., police officer, commissioner, etc.> is an executive officer.]]

[A *ministerial officer* is an officer who has a clear and mandatory duty involving the performance of specific tasks without the exercise of discretion.]

[A *legislative officer* is a member of the (Assembly/Senate/ _____ <insert name of other legislative body specified in Penal Code, § 86>) of this state.]

[A *judicial officer* includes a (juror[,]/ [or] judge [,]/ [or] referee[,]/ [or]

commissioner[,]/ [or] arbitrator [,]/ [or] umpire[,]/ [or] [other] person authorized by law to hear or determine any question or controversy).]

[Requesting or agreeing to take a bribe does not require specific words or behavior, as long as the language used and the circumstances clearly show that the person is seeking a bribe from someone else. [The People do not need to prove that the other person actually consented to give a bribe.]]

[The People do not need to prove that the defendant made any effort to follow through on the purpose for which the bribe was sought.]

New January 2006; Revised June 2007

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

Give the bracketed definition of “requesting or agreeing to take a bribe” if the prosecution is pursuing this theory.

Give the bracketed sentence that begins with “The People do not need to prove that the defendant made any effort to follow through” if there is no evidence that the defendant took any action based on the alleged bribe.

AUTHORITY

- Elements. Pen. Code, §§ 68, 86, 93.
- Bribe Defined. Pen. Code, § 7, subd. 6.
- Corruptly Defined. Pen. Code, § 7, subd. 3.
- Executive Officer Defined. *People v. Strohl* (1976) 57 Cal.App.3d 347, 361 [129 Cal.Rptr. 224].
- Ministerial Officer Defined. Gov. Code, § 820.25(b); *People v. Strohl* (1976) 57 Cal.App.3d 347, 361 [129 Cal.Rptr. 224].
- Legislative Member. Pen. Code, § 86.
- Judicial Officer. Pen. Code, § 93.
- Corrupt Intent Is an Element of Bribery. *People v. Gliksman* (1978) 78 Cal.App.3d 343, 346–350 [144 Cal.Rptr. 451]; *People v. Zerillo* (1950) 36 Cal.2d 222, 232 [223 P.2d 223].
- Meaning of Understanding or Agreement. *People v. Pic'l* (1982) 31 Cal.3d 731, 738–740 [183 Cal.Rptr. 685, 646 P.2d 847]; *People v. Diedrich* (1982) 31 Cal.3d 263, 273–274 [182 Cal.Rptr. 354, 643 P.2d 971]; *People v. Gliksman* (1978) 78 Cal.App.3d 343, 346–350 [144 Cal.Rptr. 451].
- Bribery and Extortion Distinguished. *People v. Powell* (1920) 50 Cal.App.

436, 441 [195 P. 456].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Governmental Authority, §§ 32–55.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 141, *Conspiracy, Solicitation, and Attempt*, § 141.10 (Matthew Bender).

RELATED ISSUES

See the Related Issues section of CALCRIM No. 2600, *Giving or Offering a Bribe to an Executive Officer*.

2604–2609. Reserved for Future Use

B. BRIBERY OR INTIMIDATION OF WITNESS

(i) Bribery

2610. Giving or Offering a Bribe to a Witness (Pen. Code, § 137(a))

The defendant is charged [in Count _____] with (giving[,]/ [or] offering[,]/ [or] promising) a bribe to a witness [in violation of Penal Code section 137(a)].

To prove that the defendant is guilty of this crime, the People must prove that:

1. The defendant (gave[,]/ [or] offered[,]/ [or] promised) a bribe to (a witness[,]/ [or] a person about to be called as a witness[,]/ [or] a person about to give material information to a law enforcement official about a crime)[,] [or to someone acting on the (witness's/ [or] person's) behalf];

AND

2. The defendant acted with the corrupt intent to persuade the (witness/ [or] person) to agree that the bribe would unlawfully influence the (testimony/information) that the (witness/ [or] person) would give.

As used here, *bribe* means something of present or future value or advantage, or a promise to give such a thing, that is given or offered with the corrupt intent to unlawfully influence the testimony or information of the person to whom the bribe is given.

A person acts with *corrupt intent* when he or she acts to wrongfully gain a financial or other advantage for himself, herself, or someone else.

[As used here, *witness* means someone [or a person the defendant reasonably believed to be someone]:

<Give the appropriate bracketed paragraph[s].>

- [Who knows about the existence or nonexistence of facts relating to a crime(;/.)]

[OR]

- [Whose declaration under oath has been or may be received as evidence(;/.)]

[OR]

- [Who has reported a crime to a (peace officer[,]/ [or] prosecutor[,]/ [or] probation or parole officer[,]/ [or] correctional officer[,]/ [or] judicial officer)(;/.)]

[OR

- Who has been served with a subpoena issued under the authority of any state or federal court.]]

[A person is *about to be called as a witness* (if he or she knows or has been told that he or she will be called as a witness [,]/ [or] if he or she knows material information relating to the issues in a case that has been or may be filed).]

[Information is *material* if it is significant or important.]

[(A/The) (district attorney[,]/ [or] deputy district attorney[,]/ [or] city attorney[,]/ [or] deputy city attorney[,]/ [or] Attorney General[,]/ [or] deputy attorney general[,]/ [or] _____ <insert title of peace officer included in Pen. Code, § 830 et seq.>) is a *law enforcement official*.]

[The (witness/ [or] person giving information) does not need to (have accepted the bribe[,]/ have been influenced by the bribe[,]/ [or] have intended to give the (testimony/information) the defendant sought).]

[*Offering a bribe* does not require specific words or behavior, as long as the language used and the circumstances clearly show an intent to bribe. [The thing offered does not need to actually be given, exist at the time it is offered, or have a specific value.]]

New January 2006

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

Give the bracketed sentence that begins with “The (witness/person giving information) does not need” if the evidence shows the witness did not accept the bribe or follow through on the bribe.

Give the bracketed definition of “offering a bribe” if the prosecution is pursuing this theory. Give the bracketed sentence that begins, “The thing offered does not need to actually,” on request.

AUTHORITY

- Elements. Pen. Code, § 137(a).
- Witness Defined. Pen. Code, § 136(2).

- Bribe Defined. Pen. Code, § 7, subd. 6.
- Corruptly Defined. Pen. Code, § 7, subd. 3.
- Law Enforcement Official Defined. Pen. Code, § 137(e).
- About to Be Called as a Witness. *People v. Broce* (1977) 76 Cal.App.3d 71, 75–76 [142 Cal.Rptr. 628].
- Meaning of Understanding or Agreement. *People v. Pic'l* (1982) 31 Cal.3d 731, 738–740 [183 Cal.Rptr. 685, 646 P.2d 847]; *People v. Diedrich* (1982) 31 Cal.3d 263, 273–274 [182 Cal.Rptr. 354, 643 P.2d 971]; *People v. Gliksman* (1978) 78 Cal.App.3d 343, 346–350 [144 Cal.Rptr. 451].
- Intent Requirement. *People v. Gliksman* (1978) 78 Cal.App.3d 343, 346–350 [144 Cal.Rptr. 451].
- Offering a Bribe. *People v. Britton* (1962) 205 Cal.App.2d 561, 564 [22 Cal.Rptr. 921].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Governmental Authority, §§ 32–55.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 141, *Conspiracy, Solicitation, and Attempt*, § 141.10 (Matthew Bender).

RELATED ISSUES

Extortion Distinguished

Extortion is bribery with the additional element of coercion. Accordingly, one cannot be guilty of receiving a bribe and extortion in the same transaction. (*People v. Powell* (1920) 50 Cal.App. 436, 441 [195 P. 456].)

Witness

A witness need not have information that is actually true or that relates to charges that result in conviction. (*People v. Cribas* (1991) 231 Cal.App.3d 596, 610–611 [282 Cal.Rptr. 538].)

2611. Giving or Offering a Bribe to a Witness Not to Testify (Pen. Code, § 138(a))

The defendant is charged [in Count _____] with (giving[,]/ [or] offering[,]/ [or] promising) a bribe to a witness not to testify [in violation of Penal Code section 138(a)].

To prove that the defendant is guilty of this crime, the People must prove that:

1. The defendant (gave[,]/ [or] offered[,]/ [or] promised) a bribe to (a witness/ [or] a person about to be called as a witness) [or to someone else acting on the (witness's/ [or] person's) behalf];

AND

2. The defendant acted with the corrupt intent that the bribe would unlawfully persuade the (witness/ [or] person) not to attend (a trial/ [or] _____ <insert type of other judicial proceeding>).

As used here, *bribe* means something of present or future value or advantage, or a promise to give such a thing, that is given or offered with the corrupt intent to unlawfully influence the witness not to attend (a trial/ [or] _____ <insert type of other judicial proceeding>).

A person acts with *corrupt intent* when he or she acts to wrongfully gain a financial or other advantage for himself, herself, or someone else.

[As used here, *witness* means someone [or a person the defendant reasonably believed to be someone]:

<Give the appropriate bracketed paragraph[s].>

- [Who knows about the existence or nonexistence of facts relating to a crime(;/.)]

[OR]

- [Whose declaration under oath has been or may be received as evidence(;/.)]

[OR]

- [Who has reported a crime to a (peace officer[,]/ [or] prosecutor[,]/ [or] probation or parole officer[,]/ [or] correctional officer[,]/ [or] judicial officer)(;/.)]

[OR]

- Who has been served with a subpoena issued under the authority of any state or federal court.]]

[A person is *about to be called as a witness* (if he or she knows or has

been told that he or she will be called as a witness[,]/ [or] if he or she knows material information relating to the issues in a case that has been or may be filed). [Information is *material* if it is significant or important.]]

[The (witness/ [or] person giving information) does not need to (have accepted the bribe[,]/ have been influenced by the bribe[,]/ [or] have failed to attend (the trial[,]/ [or] _____ <insert type of other judicial proceeding>)).]

[*Offering a bribe* does not require specific words or behavior, as long as the language used and the circumstances clearly show an intent to ensure that the witness will not attend (a trial/ [or] _____ <insert type of other judicial proceeding>). [The thing offered does not need to actually be given, exist at the time it is offered, or have a specific value.]]

New January 2006

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

Give the bracketed sentence that begins with “The (witness/person giving information) does not need” if the evidence shows the witness did not accept the bribe or follow through on the bribe.

Give the bracketed definition of “offering a bribe” if the prosecution is pursuing this theory. Give the bracketed sentence that begins, “The thing offered does not need to actually,” on request.

AUTHORITY

- Elements. Pen. Code, § 138(a).
- Witness Defined. Pen. Code, § 136(2).
- Bribe Defined. Pen. Code, § 7, subd. 6.
- Corruptly Defined. Pen. Code, § 7, subd. 3.
- About to Be Called as a Witness. *People v. Broce* (1977) 76 Cal.App.3d 71, 75–76 [142 Cal.Rptr. 628].
- Meaning of Understanding or Agreement. *People v. Pic'l* (1982) 31 Cal.3d 731, 738–740 [183 Cal.Rptr. 685, 646 P.2d 847]; *People v. Diedrich* (1982) 31 Cal.3d 263, 273–274 [182 Cal.Rptr. 354, 643 P.2d 971]; *People v. Gliksman* (1978) 78 Cal.App.3d 343, 346–350 [144 Cal.Rptr. 451].
- Intent Requirement. *People v. Gliksman* (1978) 78 Cal.App.3d 343, 346–350 [144 Cal.Rptr. 451].

- Offering a Bribe. *People v. Britton* (1962) 205 Cal.App.2d 561, 564 [22 Cal.Rptr. 921].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Governmental Authority, §§ 32–55.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 141, *Conspiracy, Solicitation, and Attempt*, § 141.10 (Matthew Bender).

RELATED ISSUES

See the Related Issues section of CALCRIM No. 2610, *Giving or Offering a Bribe to a Witness*.

2612. Witness Receiving a Bribe (Pen. Code, § 138(b))

The defendant is charged [in Count _____] with receiving a bribe as a witness [in violation of Penal Code section 138(b)].

To prove that the defendant is guilty of this crime, the People must prove that:

1. The defendant was (a witness/about to be called as a witness);
2. The defendant (received/ [or] offered to receive) a bribe;
3. When the defendant (received/ [or] offered to receive) the bribe, (he/she) represented that the bribe would unlawfully (influence (his/her) testimony/cause (him/her) not to attend the (trial/ _____ <insert type of other judicial proceeding>)). The representation may have been express or implied;

AND

4. The defendant acted with the corrupt intent that the bribe would unlawfully (influence (his/her) testimony/cause (him/her) not to attend the (trial/ _____ <insert type of other judicial proceeding>)).

As used here, *bribe* means something of present or future value or advantage, or a promise to give such a thing, that is requested or received with corrupt intent.

A person acts with *corrupt intent* when he or she acts to wrongfully gain a financial or other advantage for himself, herself, or someone else.

[As used here, *witness* means someone [or a person reasonably believed to be someone]:

<Give the appropriate bracketed paragraph[s].>

- [Who knows about the existence or nonexistence of facts relating to a crime(;/.)]

[OR]

- [Whose declaration under oath has been or may be received as evidence(;/.)]

[OR]

- [Who has reported a crime to a (peace officer[,]/ [or] prosecutor[,]/ [or] probation or parole officer[,]/ [or] correctional officer[,]/ [or] judicial officer)(;/.)]

[OR]

- Who has been served with a subpoena issued under the authority of any state or federal court.]]

[A person is *about to be called as a witness* (if he or she knows or has been told that he or she will be called as a witness[,]/ [or] if he or she knows material information relating to the issues in a case that has been or may be filed). [Information is *material* if it is significant or important.]]

[*Offering to receive a bribe* does not require specific words or behavior, as long as the language used and the circumstances clearly show that the person is seeking a bribe from someone else. [The People do not need to prove that the other person actually consented to give a bribe.]]

[The People do not need to prove that the defendant made any effort to follow through on the purpose for which the bribe was sought.]

New January 2006

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

Give the definition of “offering to take a bribe” if that is the prosecution’s theory of the case.

Give the bracketed sentence that begins with “The People do not need to prove” if there is no evidence that the defendant took any action based on the alleged bribe.

AUTHORITY

- Elements. Pen. Code, § 138(b).
- Witness Defined. Pen. Code, § 136(2).
- Bribe Defined. Pen. Code, § 7, subd. 6.
- Corruptly Defined. Pen. Code, § 7, subd. 3.
- About to Be Called as a Witness. *People v. Broce* (1977) 76 Cal.App.3d 71, 75–76 [142 Cal.Rptr. 628].
- Meaning of Understanding or Agreement. *People v. Pic'l* (1982) 31 Cal.3d 731, 738–740 [183 Cal.Rptr. 685, 646 P.2d 847]; *People v. Diedrich* (1982) 31 Cal.3d 263, 273–274 [182 Cal.Rptr. 354, 643 P.2d 971]; *People v. Gliksman* (1978) 78 Cal.App.3d 343, 346–350 [144 Cal.Rptr. 451].
- Offering a Bribe. *People v. Britton* (1962) 205 Cal.App.2d 561, 564 [22 Cal.Rptr. 921].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against

Governmental Authority, §§ 32–55.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 141,
Conspiracy, Solicitation, and Attempt, § 141.10 (Matthew Bender).

RELATED ISSUES

See the Related Issues section of CALCRIM No. 2610, *Giving or Offering a Bribe to a Witness*.

2613–2619. Reserved for Future Use

(ii) Threatening or Intimidating

2620. Using Force or Threatening a Witness Before Testimony or Information Given (Pen. Code, § 137(b))

The defendant is charged [in Count _____] with (using force/ [or] threatening to use force) against a person to cause that person [or someone else] to (give false (testimony/ [or] information)/ [or] withhold true (testimony/ [or] information)) [in violation of Penal Code section 137(b)].

To prove that the defendant is guilty of this crime, the People must prove that:

1. The defendant [unlawfully] (used force/ [or] threatened to use force) against _____ <insert name/description of person allegedly targeted>;

AND

<Alternative 2A—to give or withhold testimony>

- [2. When the defendant (used force/ [or] made the threat), (he/she) intended to cause _____ <insert name/description of person defendant allegedly sought to influence> to (give false testimony/ [or] withhold true testimony).]

<Alternative 2B—to give or withhold information>

- [2. When the defendant (used force/ [or] made the threat), (he/she) intended to cause _____ <insert name/description of person defendant allegedly sought to influence> to (give false material information about a crime to/ [or] withhold true material information about a crime from) a law enforcement official.]

[A person *makes a threat of force* when he or she communicates to someone else a believable threat of unlawful injury to a person or property.]

[Information is *material* if it is significant or important.]

[(A/The) (district attorney[,]/ [or] deputy district attorney[,]/ [or] city attorney[,]/ [or] deputy city attorney[,]/ [or] Attorney General[,]/ [or] deputy attorney general[,]/ [or] _____ <insert title of peace officer included in Pen. Code, § 830 et seq.>) is a *law enforcement official*.]

[The People do not need to prove that _____ <insert name/description of person defendant allegedly sought to influence> actually (gave false (testimony/information)/ [or] withheld true (testimony/information)).]

New January 2006

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

Give the bracketed sentence that begins with “A person *makes a threat of force*” whenever the prosecution alleges that the defendant made a threat. (Pen. Code, § 137(b).)

Give the bracketed sentence that begins with “The People do not need to prove that” if the evidence shows that the testimony or information of the alleged target was not affected.

AUTHORITY

- Elements. Pen. Code, § 137(b).
- Threat Defined. Pen. Code, § 137(b).
- Law Enforcement Official Defined. Pen. Code, § 137(e).
- Specific Intent Required. *People v. Womack* (1995) 40 Cal.App.4th 926, 929–930 [47 Cal.Rptr.2d 76].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Governmental Authority, §§ 6, 12.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 141, *Conspiracy, Solicitation, and Attempt*, § 141.10 (Matthew Bender).

LESSER INCLUDED OFFENSES

The misdemeanor offense of knowingly inducing a false statement to a law enforcement official in violation of Penal Code section 137(c) is not a lesser included offense of section 137(b) because the latter offense lacks the element that the defendant must actually cause a false statement to be made. (*People v. Miles* (1996) 43 Cal.App.4th 575, 580 [51 Cal.Rptr.2d 52].)

RELATED ISSUES

Penal Code Sections 137(b), 136.1, and 138

Because one cannot “influence” the testimony of a witness if the witness does not testify, a conviction under Penal Code section 137(b) is inconsistent with a conviction under Penal Code section 136.1 or 138, which require that a defendant prevent, rather than influence, testimony. (*People v. Womack* (1995) 40 Cal.App.4th 926, 931 [47 Cal.Rptr.2d 76].)

2621. Influencing a Witness by Fraud (Pen. Code, § 137(b))

The defendant is charged [in Count _____] with using fraud to influence a person to (give false (testimony/ [or] information)/ [or] withhold true (testimony/ [or] information)) [in violation of Penal Code section 137(b)].

To prove that the defendant is guilty of this crime, the People must prove that:

1. The defendant used fraud against _____ *<insert name/description of person defendant allegedly sought to influence>;*

AND

<Alternative 2A—to give or withhold testimony>

- [2. When the defendant used fraud, (he/she) intended to cause _____ *<insert name/description of person defendant allegedly sought to influence>* to (give false testimony/ [or] withhold true testimony).]

<Alternative 2B—to give or withhold information>

- [2. When the defendant used fraud, (he/she) intended to cause _____ *<insert name/description of person defendant allegedly sought to influence>* to (give false material information about a crime to/ [or] withhold true material information about a crime from) a law enforcement official.]

A person *uses fraud* when he or she makes a false statement, misrepresents information, hides the truth, or otherwise does something with the intent to deceive.

[Information is *material* if it is significant or important.]

[(A/The) (district attorney[,]/ [or] deputy district attorney[,]/ [or] city attorney[,]/ [or] deputy city attorney[,]/ [or] Attorney General[,]/ [or] deputy attorney general[,]/ [or] _____ *<insert title of peace officer included in Pen. Code, § 830 et seq.>*) is a *law enforcement official*.]

[The People do not need to prove that _____ *<insert name/description of person defendant allegedly sought to influence>* actually (gave false (testimony/information)/ [or] withheld true (testimony/information)).]

BENCH NOTES***Instructional Duty***

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

Give the bracketed sentence that begins with “The People do not need to prove that” if the evidence shows that the testimony or information of the alleged target was not affected.

AUTHORITY

- Elements. Pen. Code, § 137(b).
- Fraud Defined. *People v. Pugh* (2002) 104 Cal.App.4th 66, 72 [127 Cal.Rptr.2d 770].
- Law Enforcement Official Defined. Pen. Code, § 137(e).
- Specific Intent Required. *People v. Womack* (1995) 40 Cal.App.4th 926, 929–930 [47 Cal.Rptr.2d 76].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Governmental Authority, § 12.

LESSER INCLUDED OFFENSES

The misdemeanor offense of knowingly inducing a false statement to a law enforcement official in violation of Penal Code section 137(c) is not a lesser included offense of section 137(b) because the latter offense lacks the element that the defendant must actually cause a false statement to be made. (*People v. Miles* (1996) 43 Cal.App.4th 575, 580 [51 Cal.Rptr.2d 52].)

RELATED ISSUES***Deceiving a Witness***

Deceiving a witness is a separate crime under Penal Code section 133:

Every person who practices any fraud or deceit, or knowingly makes or exhibits any false statement, representation, token, or writing, to any witness or person about to be called as a witness upon any trial, proceeding, inquiry, or investigation whatever, authorized by law, with intent to affect the testimony of such witness, is guilty of a misdemeanor.

2622. Intimidating a Witness (Pen. Code, § 136.1(a) & (b))

The defendant is charged [in Count _____] with intimidating a witness [in violation of Penal Code section 136.1].

To prove that the defendant is guilty of this crime, the People must prove that:

<Alternative 1A—attending or giving testimony>

- [1. The defendant maliciously (tried to (prevent/ [or] discourage)/ (prevented/ [or] discouraged)) _____ *<insert name/description of person defendant allegedly sought to influence>* from (attending/ [or] giving testimony at) _____ *<insert type of judicial proceeding or inquiry authorized by law>;*]

<Alternative 1B—report of victimization>

- [1. The defendant [maliciously] (tried to (prevent/ [or] discourage)/ (prevented/ [or] discouraged)) _____ *<insert name/description of person defendant allegedly sought to influence>* from making a report that (he/she/someone else) was a victim of a crime to _____ *<insert type of official specified in Pen. Code, § 136.1(b)(1)>;*]

<Alternative 1C—causing prosecution>

- [1. The defendant [maliciously] (tried to (prevent/ [or] discourage)/ (prevented/ [or] discouraged)) _____ *<insert name/description of person defendant allegedly sought to influence>* from cooperating or providing information so that a (complaint/ indictment/information/probation violation/parole violation) could be sought and prosecuted, and from helping to prosecute that action;]

<Alternative 1D—causing arrest>

- [1. The defendant [maliciously] (tried to (prevent/ [or] discourage)/ (prevented/ [or] discouraged)) _____ *<insert name/description of person defendant allegedly sought to influence>* from (arresting[,/ [or] (causing/ [or] seeking) the arrest of [,]) someone in connection with a crime;]
2. _____ *<insert name/description of person defendant allegedly sought to influence>* was a (witness/ [or] crime victim);

AND

3. The defendant knew (he/she) was (trying to (prevent/ [or] discourage)/(preventing/ [or] discouraging)) _____ *<insert*

name/description of person defendant allegedly sought to influence
from _____ *<insert appropriate description from element 1>*
and intended to do so.

[A person acts *maliciously* when he or she unlawfully intends to annoy, harm, or injure someone else in any way, or intends to interfere in any way with the orderly administration of justice.]

[As used here, *witness* means someone [or a person the defendant reasonably believed to be someone]:

<Give the appropriate bracketed paragraph[s].>

- **[Who knows about the existence or nonexistence of facts relating to a crime(;/.)]**

[OR]

- **[Whose declaration under oath has been or may be received as evidence(;/.)]**

[OR]

- **[Who has reported a crime to a (peace officer[,]/ [or] prosecutor[,]/ [or] probation or parole officer[,]/ [or] correctional officer[,]/ [or] judicial officer)(;/.)]**

[OR]

- **[Who has been served with a subpoena issued under the authority of any state or federal court.]]**

[A person is a *victim* if there is reason to believe that a federal or state crime is being or has been committed or attempted against him or her.]

[It is not a defense that the defendant was not successful in preventing or discouraging the (victim/ [or] witness).]

[It is not a defense that no one was actually physically injured or otherwise intimidated.]

New January 2006

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

In element 1, alternative 1A applies to charges under Penal Code section 136.1(a), which prohibits “knowingly and maliciously” preventing or attempting to prevent a witness or victim from giving testimony. Alternatives 1B through 1D apply to

charges under Penal Code section 136.1(b). Subdivision (b) does not use the words “knowingly and maliciously.” However, subdivision (c) provides a higher punishment if a violation of either subdivision (a) or (b) is done “knowingly and maliciously,” and one of the other listed sentencing factors is proved. An argument can be made that the knowledge and malice requirements apply to all violations of Penal Code section 136.1(b), not just those charged with the additional sentencing factors under subdivision (c). Because the offense always requires specific intent, the committee has included the knowledge requirement with the specific intent requirement in element 3. (*People v. Ford* (1983) 145 Cal.App.3d 985, 990 [193 Cal.Rptr. 684]; see also *People v. Womack* (1995) 40 Cal.App.4th 926, 929–930 [47 Cal.Rptr.2d 76].) If the court concludes that the malice requirement also applies to all violations of subdivision (b), the court should give the bracketed word “maliciously” in element 1, in alternatives 1B through 1D, and the definition of this word.

If the defendant is charged with one of the sentencing factors in Penal Code section 136.1(c), give CALCRIM No. 2623, *Intimidating a Witness: Sentencing Factors*. If the defendant is charged with the sentencing factor based on a prior conviction, the court must give both CALCRIM No. 2623 and CALCRIM No. 3100, *Prior Conviction: Nonbifurcated Trial*, unless the court has granted a bifurcated trial on the prior conviction or the defendant has stipulated to the conviction.

Note that Penal Code section 136.1(a)(3) states, “For purposes of this section, evidence that the defendant was a family member who interceded in an effort to protect the witness or victim shall create a presumption that the act was without malice.” It is unclear whether the court must instruct on this presumption.

AUTHORITY

- Elements. Pen. Code, § 136.1(a) & (b).
- Malice Defined. Pen. Code, § 136(1).
- Witness Defined. Pen. Code, § 136(2).
- Victim Defined. Pen. Code, § 136(3).
- Specific Intent Required. *People v. Ford* (1983) 145 Cal.App.3d 985, 990 [193 Cal.Rptr. 684]; see also *People v. Womack* (1995) 40 Cal.App.4th 926, 929–930 [47 Cal.Rptr.2d 76].

Secondary Sources

2 Witkin & Epstein, *California Criminal Law* (3d ed. 2000) Crimes Against Governmental Authority, §§ 5, 6.

4 Millman, Sevilla & Tarlow, *California Criminal Defense Practice*, Ch. 82, *Witnesses*, § 82.07, Ch. 84, *Motions at Trial*, § 84.11 (Matthew Bender).

5 Millman, Sevilla & Tarlow, *California Criminal Defense Practice*, Ch. 91, *Sentencing*, §§ 91.23[6][e], 91.43 (Matthew Bender).

6 Millman, Sevilla & Tarlow, *California Criminal Defense Practice*, Ch. 142, *Crimes Against the Person*, § 142.13[4][b]; Ch. 144, *Crimes Against Order*, § 144.03[2], [4] (Matthew Bender).

LESSER INCLUDED OFFENSES

A violation of Penal Code section 136.1(a) or (b) is a felony-misdemeanor, punishable by a maximum of three years in state prison. If the defendant is also charged with one of the sentencing factors in Penal Code section 136.1(c), then the offense is a felony punishable by two, three, or four years. If the defendant is charged under Penal Code section 131.6(c), then the offenses under subdivisions (a) and (b) are lesser included offenses. The court must provide the jury with a verdict form on which the jury will indicate if the prosecution has proved the sentencing factor alleged. If the jury finds that this allegation has not been proved, then the offense should be set at the level of the lesser offense.

The misdemeanor offense of knowingly inducing a false statement to a law enforcement official in violation of Penal Code section 137(c) is not a lesser included offense of Penal Code section 137(b) because the latter offense lacks the element that the defendant must actually cause a false statement to be made. (*People v. Miles* (1996) 43 Cal.App.4th 575, 580 [51 Cal.Rptr.2d 52].)

RELATED ISSUES***Penal Code Sections 137(b), 136.1, and 138***

Because one cannot “influence” the testimony of a witness if the witness does not testify, a conviction under Penal Code section 137(b) is inconsistent with a conviction under Penal Code section 136.1 or 138, which requires that a defendant prevent, rather than influence, testimony. (*People v. Womack* (1995) 40 Cal.App.4th 926, 931 [47 Cal.Rptr.2d 76].)

**2623. Intimidating a Witness: Sentencing Factors (Pen. Code,
§ 136.1(c))**

If you find the defendant guilty of intimidating a witness, you must then decide whether the People have proved the additional allegation[s] that the defendant [acted maliciously] [and] [(acted in furtherance of a conspiracy/ [or] used or threatened to use force/ [or] acted to obtain money or something of value)].

To prove (this/these) allegation[s], the People must prove that:

[1. The defendant acted maliciously(;/.)]

[AND]

<Alternative A—furtherance of a conspiracy>

[(2A/1). The defendant acted with the intent to assist in a conspiracy to intimidate a witness(;/.)]

<Alternative B—used or threatened force>

[(2B/2). The defendant used force or threatened, either directly or indirectly, to use force or violence on the person or property of [a] (witness[,]/ [or] victim[,]/ [or] any other person)(;/.)]

<Alternative C—financial gain>

[(2C/3). The defendant acted (in order to obtain (money/ [or] something of value)/ [or] at the request of someone else in exchange for something of value).]

[Instruction[s] _____ *<insert instruction number[s]>* explain[s] when someone is acting in a conspiracy to intimidate a witness. You must apply (that/those) instruction[s] when you decide whether the People have proved this additional allegation. *<The court must modify and give Instruction 415 et seq., explaining the law of conspiracy as it applies to the facts of the particular case.>*

[A person acts *maliciously* when he or she unlawfully intends to annoy, harm, or injure someone else in any way, or intends to interfere in any way with the orderly administration of justice.]

The People have the burden of proving (this/each) allegation beyond a reasonable doubt. If the People have not met this burden [for any allegation], you must find that (this/the) allegation has not been proved.

BENCH NOTES***Instructional Duty***

If the defendant is charged with a felony based on Penal Code section 136.1(c), the court has a **sua sponte** duty to instruct on the alleged sentencing factor. This instruction **must** be given with CALCRIM No. 2622, *Intimidating a Witness*.

As noted in the Bench Notes to CALCRIM No. 2622, the court will instruct the jury that knowledge and malice are elements of a violation of Penal Code section 136.1(a) and may, in some circumstances, also instruct that malice is an element of a violation of Penal Code section 136.1(b). If the court has given the malice element in CALCRIM No. 2622, the court may delete it here. If the court has not already given this element and the defendant is charged under subdivision (c), the court must give the bracketed element requiring malice here.

If the defendant is charged with the sentencing factor based on a prior conviction, the court must give CALCRIM No. 3100, *Prior Conviction: Nonbifurcated Trial*, unless the court has granted a bifurcated trial on the prior conviction or the defendant has stipulated to the conviction. In such cases, the court should also give this instruction, CALCRIM No. 2623, only if the court has not already instructed the jury on malice or the defendant is also charged with another sentencing factor.

The court must provide the jury with a verdict form on which the jury will indicate if each alleged sentencing factor has or has not been proved.

If the court instructs on furtherance of a conspiracy, give the appropriate corresponding instructions on conspiracy. (See CALCRIM No. 415, *Conspiracy*.)

AUTHORITY

- Factors. Pen. Code, § 136.1(c).
- Malice Defined. Pen. Code, § 136(1).

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Governmental Authority, § 6.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 82, *Witnesses*, § 82.07, Ch. 84, *Motions at Trial*, § 84.11 (Matthew Bender).

5 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 91, *Sentencing*, §§ 91.23[6][e], 91.43 (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, § 142.13[4][b], Ch. 144, *Crimes Against Order*, § 144.03[2], [4] (Matthew Bender).

**2624. Threatening a Witness After Testimony or Information
Given (Pen. Code, § 140(a))**

The defendant is charged [in Count _____] with (using force/ [or] threatening to use force) against a witness [in violation of Penal Code section 140(a)].

To prove that the defendant is guilty of this crime, the People must prove that:

1. _____ *<insert name/description of person allegedly targeted>* gave (assistance/ [or] information) to a (law enforcement officer/ public prosecutor) in a (criminal case/juvenile court case);

[AND]

2. The defendant willfully (used force/ [or] threatened to use force or violence against _____ *<insert name/description of person allegedly targeted>*/ [or] threatened to take, damage, or destroy the property of _____ *<insert name/description of person allegedly targeted>*) because (he/she) had given that (assistance/ [or] information)(;/.)

<Give the following language if the violation is based on a threat>

[AND]

- [3. A reasonable listener in a similar situation with similar knowledge would interpret the threat, in light of the context and surrounding circumstances, as a serious expression of intent to commit an act of unlawful force or violence rather than just an expression of jest or frustration(;/.)]

[OR]

- [(3./4.) A reasonable listener in a similar situation with similar knowledge would interpret the threat, in light of the context and surrounding circumstances, as a serious expression of intent to commit an act of unlawful taking, damage or destruction of property rather than just an expression of jest or frustration.]

Someone commits an act *willfully* when he or she does it willingly or on purpose.

[An officer or employee of (a/an) (local police department[,]/ [or] sheriff's office[,]/ [or] _____ *<insert title of agency of peace officer enumerated in Pen. Code, § 13519(b)>*) is a **law enforcement officer**.]

[A lawyer employed by (a/an/the) (district attorney's office[,]/ [or]

Attorney General's office[,]/ [or] city (prosecutor's/attorney's) office) to prosecute cases is a *public prosecutor*.]

[The People do not need to prove that the threat was communicated to _____ <insert name/description of person allegedly targeted> or that (he/she) was aware of the threat.]

New January 2006; Revised August 2012

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

AUTHORITY

- Elements. Pen. Code, § 140(a).
- Witness Defined. Pen. Code, § 136(2).
- Victim Defined. Pen. Code, § 136(3).
- Public Prosecutor Defined. Gov. Code, §§ 26500, 12550, 41803.
- Law Enforcement Officer Defined. Pen. Code, § 13519(b).
- General Intent Offense. *People v. McDaniel* (1994) 22 Cal.App.4th 278, 283 [27 Cal.Rptr.2d 306].
- Threat Need Not Be Communicated to Target. *People v. McLaughlin* (1996) 46 Cal.App.4th 836, 842 [54 Cal.Rptr.2d 4].
- Reasonable Listener Standard. *People v. Lowery* (2011) 52 Cal.4th 419, 427 [128 Cal.Rptr.3d 648, 257 P.3d 72].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Governmental Authority, § 9.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 140, *Challenges to Crimes*, § 140.02; Ch. 142, *Crimes Against the Person*, § 142.11A[1][a] (Matthew Bender).

COMMENTARY

Penal Code section 140 does not define “threat.” (Cf. Pen. Code, §§ 137(b), 76 [both statutes containing definition of threat].) In *People v. McDaniel* (1994) 22 Cal.App.4th 278, 283 [27 Cal.Rptr.2d 306], the Court of Appeal held that threatening a witness under Penal Code section 140 is a general intent crime. According to the holding of *People v. McDaniel*, *supra*, 22 Cal.App.4th at p. 284, there is no requirement that the defendant intend to cause fear to the victim or intend to affect the victim’s conduct in any manner. In *People v. McLaughlin* (1996) 46 Cal.App.4th 836, 842 [54 Cal.Rptr.2d 4], the court held that the threat

does not need to be communicated to the intended target in any manner. The committee has drafted this instruction in accordance with these holdings. However, the court may wish to consider whether the facts in the case before it demonstrate a sufficiently “genuine threat” to withstand First Amendment scrutiny. (See *In re George T.* (2004) 33 Cal.4th 620, 637–638 [16 Cal.Rptr.3d 61, 93 P.3d 1007]; *People v. Gudger* (1994) 29 Cal.App.4th 310, 320–321 [34 Cal.Rptr.2d 510]; *Watts v. United States* (1969) 394 U.S. 705, 707 [89 S.Ct. 1399, 22 L.Ed.2d 664]; *United States v. Kelner* (2d Cir. 1976) 534 F.2d 1020, 1027.)

2625–2629. Reserved for Future Use

C. EVIDENCE TAMPERING

2630. Evidence Tampering by Peace Officer or Other Person (Pen. Code, § 141)

The defendant is charged [in Count _____] with tampering with evidence [in violation of Penal Code section 141].

To prove that the defendant is guilty of this crime, the People must prove that:

1. The defendant willfully, intentionally, and wrongfully (changed[,]/ [or] planted[,]/ [or] placed[,]/ [or] made[,]/ [or] hid[,]/ [or] moved) _____ <insert name/description of physical matter at issue>;
2. The defendant knew (he/she) was (changing[,]/ [or] planting[,]/ [or] placing[,]/ [or] making[,]/ [or] hiding[,]/ [or] moving) the _____ <insert name/ description of physical matter at issue>;

[AND]

3. When the defendant (changed[,]/ [or] planted[,]/ [or] placed[,]/ [or] made[,]/ [or] hid[,]/ [or] moved) the _____ <insert name/description of physical matter at issue>, (he/she) intended that (his/her) action would result in (someone being charged with a crime/ [or] the _____ <insert name/description of physical matter at issue> being wrongfully produced as genuine or true in (a/an) _____ <insert type of court proceeding specified in Pen. Code, § 141>)(;/.)

<Give element 4 if the defendant is charged under Pen. Code, § 141(b).>

[AND]

4. When the defendant acted, (he/she) was a peace officer.]

Someone commits an act *willfully* when he or she does it willingly or on purpose.

[A sworn member of _____ <insert name of agency that employs peace officer>, authorized by _____ <insert appropriate section from Pen. Code, § 830 et seq.> to _____ <describe statutory authority>, is a *peace officer*.]

New January 2006; Revised August 2016

BENCH NOTES***Instructional Duty***

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

Give element 4 if the defendant is a peace officer charged with a felony violation of Penal Code section 141(b).

The jury must determine whether the defendant was a peace officer. (See *People v. Flood* (1998) 18 Cal.4th 470, 482 [76 Cal.Rptr.2d 180, 957 P.2d 869].) The court must instruct the jury on the appropriate definition of “peace officer” from the statute. (*Ibid.*) It is error for the court to instruct that a person is a peace officer as a matter of law. (*Ibid.* [instruction that “Officer Bridgeman and Officer Gurney are peace officers” was error].)

AUTHORITY

- Elements. Pen. Code, § 141.
- Peace Officer Defined. Pen. Code, § 830 et seq.

Secondary Sources

2 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against Governmental Authority, § 4.

3 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 70, *Discovery and Inspection*, § 70.21[3] (Matthew Bender).

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 83, *Evidence*, § 83.10[2] (Matthew Bender).

LESSER INCLUDED OFFENSES

If the defendant is charged with a felony based on being a peace officer (Pen. Code, § 141(b)), then the misdemeanor of evidence tampering by a non-peace officer is a lesser included offense. (Pen. Code, § 141(a).)

2631–2639. Reserved for Future Use

D. PERJURY

2640. Perjury (Pen. Code, § 118)

The defendant is charged [in Count _____] with perjury [in violation of Penal Code section 118].

To prove that the defendant is guilty of this crime, the People must prove that:

<Alternative 1A—defendant took an oath>

- [1. The defendant took an oath to (testify[,]/ [or] declare[,]/ [or] depose[,]/ [or] certify) truthfully before a competent (tribunal[,]/ [or] officer[,]/ [or] person) under circumstances in which the oath of the State of California lawfully may be given;]

<Alternative 1B—defendant gave statement under penalty of perjury>

- [1. The defendant (testified[,]/ [or] declared[,]/ [or] deposed[,]/ [or] certified) under penalty of perjury under circumstances in which such (testimony[,]/ [or] declaration[,]/ [or] deposition[,]/ [or] certificate) was permitted by law;]
2. When the defendant (testified[,]/ [or] declared[,]/ [or] deposed[,]/ [or] certified), (he/she) willfully stated that the information was true even though (he/she) knew it was false;
3. The information was material;
4. The defendant knew (he/she) was making the statement under (oath/penalty of perjury);

[AND]

5. When the defendant made the false statement, (he/she) intended to (testify[,]/ [or] declare[,]/ [or] depose[,]/ [or] certify) falsely while under (oath/penalty of perjury)(;/.)

<Give element 6 only if statement made in declaration, deposition, or certificate.>

[AND]

6. The defendant signed and delivered (his/her) (declaration[,]/ [or] deposition[,]/ [or] certificate) to someone else intending that it be circulated or published as true.]

Someone commits an act *willfully* when he or she does it willingly or on purpose.

[An *oath* is an affirmation or any other method authorized by law to affirm the truth of a statement.]

[Information is *material* if it is probable that the information would influence the outcome of the proceedings, but it does not need to actually have an influence on the proceedings.]

[Information is *material* if _____ *<insert appropriate definition; see Bench Notes>.*]

The People do not need to prove that the defendant knew that the information in (his/her) statement was material.

You may not find the defendant's statement was false based on the testimony of _____ *<insert name of witness>* alone. In addition to the testimony of _____ *<insert name of witness>*, there must be some other evidence that the defendant's statement was false. This other evidence may be direct or indirect. [However, if you conclude, based on the defendant's own testimony, that the allegedly false statement was in fact false, then additional evidence is not required.]

If the defendant actually believed that the statement was true, the defendant is not guilty of this crime even if the defendant's belief was mistaken.

The People allege that the defendant made the following false statement[s]: _____ *<insert alleged statement[s]>.*

[You may not find the defendant guilty unless all of you agree that the People have proved that the defendant made at least one false statement and you all agree on which particular false statement the defendant made. The People do not need to prove that all the allegedly false statements were in fact false.]

[It is not a defense (that the oath was given or taken in an irregular manner/ [or] that the defendant did not go before or take the oath in the presence of the officer claiming to administer the oath) as long as the defendant caused the officer administering the oath to certify that the oath had been taken.]

[When a person makes a statement, without qualification, that information is true, but he or she does not know whether the information is true, the making of that statement is the same as saying something that the person knows is false.]

[If the defendant attempted to correct the statement after it was made, that attempt may show that the defendant did not intend to (testify[,]/ [or] declare[,]/ [or] depose[,]/ [or] certify) falsely. It is up to you to decide the meaning and importance of that conduct.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

The court has a **sua sponte** duty to define “material.” (*People v. Kobrin* (1995) 11 Cal.4th 416, 430 [45 Cal.Rptr.2d 895, 903 P.2d 1027] [materiality is a fact question to be decided by the jury].) The first bracketed definition of material is appropriate for court proceedings or legislative hearings. (*People v. Hedgecock* (1990) 51 Cal.3d 395, 405 [272 Cal.Rptr. 803, 795 P.2d 1260] [not appropriate for charge of perjury on required disclosure forms].) For other types of proceedings, the court should use the second bracketed sentence, inserting an appropriate definition in the blank provided. (*Id.* at pp. 405–407.)

The court has a **sua sponte** duty to instruct the jury about the need for corroboration of the evidence of perjury. (*People v. Di Giacomo* (1961) 193 Cal.App.2d 688, 698 [14 Cal.Rptr. 574]; Pen. Code, § 118(b).) If the evidence that the statement is false is based in whole or in part on the defendant’s testimony, give the bracketed sentence that begins with “However, if you conclude, based on the defendant’s own testimony.”

If the prosecution alleges under a single count that the defendant made multiple statements that were perjury, the court has a **sua sponte** duty to instruct on unanimity. (*People v. McRae* (1967) 256 Cal.App.2d 95, 120–121 [63 Cal.Rptr. 854].) Give the bracketed paragraph that begins with “You may not find the defendant guilty unless.”

Give element 6 if the case involves a declaration, deposition, or certificate. (Pen. Code, § 124; *People v. Griffini* (1998) 65 Cal.App.4th 581, 596 [76 Cal.Rptr.2d 590] [delivery requirement applies to “declaration”; discussing at length meaning of “deposition,” “declaration,” “certificate,” and “affidavit”]; *Collins v. Superior Court* (2001) 89 Cal.App.4th 1244, 1247 [108 Cal.Rptr.2d 123]; *People v. Post* (2001) 94 Cal.App.4th 467, 480–481 [114 Cal.Rptr.2d 356].)

Give the bracketed sentence that begins with “It is not a defense (that the oath was given or taken in an irregular manner)” on request if supported by the evidence and when instructing with element 1A. (Pen. Code, § 121.)

Give the bracketed sentence that begins with “When a person makes a statement, without qualification,” on request if supported by the evidence. (Pen. Code, § 125.)

If there is sufficient evidence, give the bracketed paragraph that begins with “If the defendant attempted to correct.” (*People v. Baranov* (1962) 201 Cal.App.2d 52, 60–61 [19 Cal.Rptr. 866].)

AUTHORITY

- Elements. Pen. Code, § 118.
- Oath Defined. Pen. Code, § 119.
- Irregular Oath Not a Defense. Pen. Code, § 121.

- Knowledge of Materiality Not Necessary. Pen. Code, § 123.
- Completion of Deposition, Affidavit, or Certificate. Pen. Code, § 124; *Collins v. Superior Court* (2001) 89 Cal.App.4th 1244, 1247 [108 Cal.Rptr.2d 123].
- Unqualified Statement Equivalent to False Statement. Pen. Code, § 125.
- Material Defined. *People v. Pierce* (1967) 66 Cal.2d 53, 61 [56 Cal.Rptr. 817, 423 P.2d 969]; *People v. Hedgecock* (1990) 51 Cal.3d 395, 405 [272 Cal.Rptr. 803, 795 P.2d 1260]; *People v. Rubio* (2004) 121 Cal.App.4th 927, 930–934 [17 Cal.Rptr.3d 524].
- Materiality Is Element to Be Decided by Jury. *People v. Kobrin* (1995) 11 Cal.4th 416, 430 [45 Cal.Rptr.2d 895, 903 P.2d 1027]; *People v. Feinberg* (1997) 51 Cal.App.4th 1566, 1576 [60 Cal.Rptr.2d 323].
- Specific Intent to Testify Falsely Required. *People v. Viniegra* (1982) 130 Cal.App.3d 577, 584 [181 Cal.Rptr. 848]; see also *People v. Hagen* (1998) 19 Cal.4th 652, 663–664 [80 Cal.Rptr.2d 24, 967 P.2d 563] [discussing intent requirement for perjury].
- Good Faith Belief Statement True Negates Intent. *People v. Von Tiedeman* (1898) 120 Cal. 128, 134 [52 P. 155] [cited with approval in *People v. Hagen* (1998) 19 Cal.4th 652, 663–664 [80 Cal.Rptr.2d 24, 967 P.2d 563]]; *People v. Louie* (1984) 158 Cal.App.3d Supp. 28, 43 [205 Cal.Rptr. 247].
- Declaration Must Be Delivered. *People v. Griffini* (1998) 65 Cal.App.4th 581, 596 [76 Cal.Rptr.2d 590].
- Unanimity. *People v. McRae* (1967) 256 Cal.App.2d 95, 120–121 [63 Cal.Rptr. 854].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Governmental Authority, §§ 56–81.

2 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 40, *Accusatory Pleadings*, § 40.07[6] (Matthew Bender).

LESSER INCLUDED OFFENSES

- Attempted Perjury. *People v. Post* (2001) 94 Cal.App.4th 467, 480–481 [114 Cal.Rptr.2d 356].

RELATED ISSUES

Unsigned Deposition

In *People v. Post* (2001) 94 Cal.App.4th 467, 480–481 [114 Cal.Rptr.2d 356], the court held that an unexecuted deposition transcript was like an undelivered statement that could not form the basis for a perjury conviction. Nevertheless, it was sufficient evidence to support a conviction on the lesser included offense of attempted perjury. (*Ibid.*)

2641. Perjury by False Affidavit (Pen. Code, § 118a)

The defendant is charged [in Count _____] with perjury by false affidavit [in violation of Penal Code section 118a].

To prove that the defendant is guilty of this crime, the People must prove that:

1. The defendant gave an affidavit in which (he/she) (swore[,]/ [or] affirmed[,]/ [or] declared[,]/ [or] deposed[,]/ [or] certified) that (he/she) would (testify[,]/ [or] declare[,]/ [or] depose[,]/ [or] certify) before a competent (tribunal[,]/ [or] officer[,]/ [or] person) in connection with a case that had been or would be filed;
2. The defendant signed and delivered (his/her) affidavit to someone else intending that it be used, circulated, or published as true;
3. In the affidavit, the defendant willfully stated that information was true even though (he/she) knew it was false;
4. The information was material;
5. The defendant knew (he/she) was making the statement under (oath/affirmation);

AND

6. When the defendant made the false statement, (he/she) intended to (testify[,]/ [or] declare[,]/ [or] depose[,]/ [or] certify) falsely while under (oath/affirmation).

Someone commits an act *willfully* when he or she does it willingly or on purpose.

An *affidavit* is a written statement made under an (oath/affirmation) given by a person authorized to administer oaths. [An *oath* is an affirmation or any other method authorized by law to affirm the truth of a statement.]

[Information is *material* if it is probable that the information would influence the outcome of the proceedings, but it does not need to actually have an influence on the proceedings.]

[Information is *material* if _____ <insert appropriate definition; see Bench Notes>.]

The People do not need to prove that the defendant knew that the information in (his/her) statement was material.

You may not find the defendant's statement was false based on the

testimony of _____ *<insert name of witness>* alone. In addition to the testimony of _____ *<insert name of witness>*, there must be some other evidence that the defendant's statement was false. This other evidence may be direct or indirect. [However, if you conclude, based on the defendant's own testimony, that the allegedly false statement was in fact false, then additional evidence is not required.]

If the defendant actually believed that the statement was true, the defendant is not guilty of this crime even if the defendant's belief was mistaken.

The People allege that the defendant made the following false statement[s]: _____ *<insert alleged statement[s]>*.

[You may not find the defendant guilty unless all of you agree that the People have proved that the defendant made at least one false statement and you all agree on which particular false statement the defendant made. The People do not need to prove that all the allegedly false statements were in fact false.]

[It is not a defense (that the oath was given or taken in an irregular manner/ [or] that the defendant did not go before or take the oath in the presence of the officer claiming to administer the oath) as long as the defendant caused the officer administering the oath to certify that the oath had been taken.]

[If you find beyond a reasonable doubt that after the defendant made the statement[s] in the affidavit, (he/she) testified under oath in another case involving the same facts, but made [a] statement[s] that (was/were) different from (that/those) in the affidavit, you may, but are not required to, rely on that testimony to conclude that the statement[s] in the affidavit (is/are) false.]

[When a person makes a statement, without qualification, that information is true, but he or she does not know whether the information is true, the making of that statement is the same as saying something that the person knows is false.]

[If the defendant attempted to correct the statement after it was made, that attempt may show that the defendant did not intend to (testify[,]/ [or] declare[,]/ [or] depose[,]/ [or] certify) falsely. It is up to you to decide the meaning and importance of that conduct.]

New January 2006

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

The court has a **sua sponte** duty to define “material.” (*People v. Kobrin* (1995) 11 Cal.4th 416, 430 [45 Cal.Rptr.2d 895, 903 P.2d 1027] [materiality is a fact question to be decided by the jury].) The first bracketed definition of material is appropriate for court proceedings or legislative hearings. (*People v. Hedgecock* (1990) 51 Cal.3d 395, 405 [272 Cal.Rptr. 803, 795 P.2d 1260] [not appropriate for charge of perjury on required disclosure forms].) For other types of proceedings, the court should use the second bracketed sentence, inserting an appropriate definition in the blank provided. (*Ibid.*)

The court has a **sua sponte** duty to instruct the jury about the need for corroboration of the evidence of perjury. (*People v. Di Giacomo* (1961) 193 Cal.App.2d 688, 698 [14 Cal.Rptr. 574]; Pen. Code, § 118(b).) If the evidence that the statement is false is based in whole or in part on the defendant’s testimony, give the bracketed sentence that begins with “However, if you conclude, based on the defendant’s own testimony.”

If the prosecution alleges under a single count that the defendant made multiple statements that were perjury, the court has a **sua sponte** duty to instruct on unanimity. (*People v. McRae* (1967) 256 Cal.App.2d 95, 120–121 [63 Cal.Rptr. 854].) Give the bracketed paragraph that begins with “You may not find the defendant guilty unless.”

Give the bracketed sentence that begins with “It is not a defense (that the oath was given or taken in an irregular manner” on request if supported by the evidence. (Pen. Code, § 121.)

Do not give the bracketed paragraph stating that defendant “testified under oath in another case involving the same facts” if there is evidence that the defendant’s statements alleged to be false in the current case were in fact true. (Pen. Code, § 118a; Evid. Code, §§ 600–607; *People v. Roder* (1983) 33 Cal.3d 491, 497–505 [189 Cal.Rptr. 501, 658 P.2d 1302].) Although the statute creates a rebuttable presumption that the first statements made were false, the instruction has been written as a permissive inference. An instruction phrased as a rebuttable presumption would create an unconstitutional mandatory presumption. (See *People v. Roder, supra*, 33 Cal.3d at pp. 497–505.)

Give the bracketed sentence that begins with “When a person makes a statement, without qualification,” on request if supported by the evidence. (Pen. Code, § 125.)

If there is sufficient evidence, give the bracketed paragraph that begins with “If the defendant attempted to correct.” (*People v. Baranov* (1962) 201 Cal.App.2d 52, 60–61 [19 Cal.Rptr. 866].)

AUTHORITY

- Elements. Pen. Code, § 118a.
- Oath Defined. Pen. Code, § 119.
- Irregular Oath Not a Defense. Pen. Code, § 121.
- Knowledge of Materiality Not Necessary. Pen. Code, § 123.

- Completion of Deposition, Affidavit, or Certificate. Pen. Code, § 124; *Collins v. Superior Court* (2001) 89 Cal.App.4th 1244, 1247 [108 Cal.Rptr.2d 123].
- Unqualified Statement Equivalent to False Statement. Pen. Code, § 125.
- Material Defined. *People v. Pierce* (1967) 66 Cal.2d 53, 61 [56 Cal.Rptr. 817, 423 P.2d 969]; *People v. Hedgecock* (1990) 51 Cal.3d 395, 405 [272 Cal.Rptr. 803, 795 P.2d 1260]; *People v. Rubio* (2004) 121 Cal.App.4th 927, 930–934 [17 Cal.Rptr.3d 524].
- Materiality Is Element to Be Decided by Jury. *People v. Kobrin* (1995) 11 Cal.4th 416, 430 [45 Cal.Rptr.2d 895, 903 P.2d 1027]; *People v. Feinberg* (1997) 51 Cal.App.4th 1566, 1576 [60 Cal.Rptr.2d 323].
- Specific Intent to Testify Falsely Required. *People v. Viniegra* (1982) 130 Cal.App.3d 577, 584 [181 Cal.Rptr. 848]; see also *People v. Hagen* (1998) 19 Cal.4th 652, 663–664 [80 Cal.Rptr.2d 24, 967 P.2d 563] [discussing intent requirement for perjury].
- Good Faith Belief Statement True Negates Intent. *People v. Von Tiedeman* (1998) 120 Cal. 128, 134 [52 P. 155] [cited with approval in *People v. Hagen* (1998) 19 Cal.4th 652, 663–664 [80 Cal.Rptr.2d 24, 967 P.2d 563]]; *People v. Louie* (1984) 158 Cal.App.3d Supp. 28, 43 [205 Cal.Rptr. 247].
- Unanimity. *People v. McRae* (1967) 256 Cal.App.2d 95, 120–121 [63 Cal.Rptr. 854].
- Mandatory Presumption Unconstitutional Unless Instructed as Permissive Inference. *People v. Roder* (1983) 33 Cal.3d 491, 497–505 [189 Cal.Rptr. 501, 658 P.2d 1302].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Governmental Authority, §§ 56–81.

2 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 40, *Accusatory Pleadings*, § 40.07[6] (Matthew Bender).

LESSER INCLUDED OFFENSES

- Attempted Perjury. *People v. Post* (2001) 94 Cal.App.4th 467, 480–481 [114 Cal.Rptr.2d 356].

RELATED ISSUES

See the Related Issues section of CALCRIM No. 2640, *Perjury*.

2642–2649. Reserved for Future Use

E. THREATENING OR RESISTING OFFICER

2650. Threatening a Public Official (Pen. Code, § 76)

The defendant is charged [in Count _____] with threatening a public official [in violation of Penal Code section 76].

To prove that the defendant is guilty of this crime, the People must prove that:

1. The defendant willingly (threatened to kill/ [or] threatened to cause serious bodily harm to) (a/an) _____ *<insert title of person specified in Pen. Code, § 76(a)>* [or a member of the immediate family of (a/an) _____ *<insert title of person specified in Pen. Code, § 76(a)>*];
2. When the defendant acted, (he/she) intended that (his/her) statement be taken as a threat;
3. When the defendant acted, (he/she) knew that the person (he/she) threatened was (a/an) _____ *<insert title of person specified in Pen. Code, § 76(a)>* [or a member of the immediate family of (a/an) _____ *<insert title of person specified in Pen. Code, § 76(a)>*];
4. When the defendant acted, (he/she) had the apparent ability to carry out the threat;

[AND]

5. The person threatened reasonably feared for (his/her) safety [or for the safety of (his/her) immediate family](;/.)

<Give element 6 if directed at a person specified in Pen. Code, § 76(d) or (e).>

[AND]

6. The threat was directly related to the _____'s *<insert title of person specified in Pen. Code, § 76(d) or (e)>* performance of (his/her) job duties.]

A threat may be oral or written and may be implied by a pattern of conduct or a combination of statements and conduct.

[When the person making the threat is an incarcerated prisoner with a stated release date, the *ability to carry out the threat* includes the ability to do so in the future.]

[*Serious bodily harm* includes serious physical injury or serious traumatic condition.]

[Immediate family includes a spouse, parent, or child[, or anyone who has regularly resided in the household for the past six months].]

[Staff of a judge includes court officers and employees[, as well as commissioners, referees, and retired judges sitting on assignment].]

[The defendant does not have to communicate the threat directly to the intended victim, but may do so through someone else.]

[Someone who intends that a statement be understood as a threat does not have to actually intend to carry out the threatened act [or intend to have someone else do so].]

New January 2006

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

AUTHORITY

- Elements and Definitions. Pen. Code, § 76.
- Reasonable Fear by Victim Is Element. *People v. Andrews* (1999) 75 Cal.App.4th 1173, 1178 [89 Cal.Rptr.2d 683].
- Statute Constitutional. *People v. Gudger* (1994) 29 Cal.App.4th 310, 321 [34 Cal.Rptr.2d 510].
- This Instruction Upheld. *People v. Barrios* (2008) 163 Cal.App.4th 270, 278 [77 Cal.Rptr.3d 456].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Governmental Authority, § 16.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, § 142.11A[1][b] (Matthew Bender).

LESSER INCLUDED OFFENSES

An offense under Penal Code section 71, threatening a public officer to prevent him or her from performing his or her duties, may be a lesser included offense. However, there is no case law on this issue.

RELATED ISSUES

Threat Must Convey Intent to Carry Out

“Although there is no requirement in section 76 of specific intent to execute the threat, the statute requires the defendant to have the specific intent that the statement be taken as a threat and also to have the apparent ability to carry it out,

requirements which convey a sense of immediacy and the reality of potential danger and sufficiently proscribe only true threats, meaning threats which ‘convincingly express an intention of being carried out.’ . . . [¶] . . . Thus, section 76 . . . adequately expresses the notion that the threats proscribed are only those ‘so unequivocal, unconditional, immediate and specific as to the person threatened, as to convey a gravity of purpose and imminent prospect of execution.’ ” [citations omitted] (*People v. Gudger* (1994) 29 Cal.App.4th 310, 320–321 [34 Cal.Rptr.2d 510]; see also *In re George T.* (2004) 33 Cal.4th 620, 637–638 [16 Cal.Rptr.3d 61, 93 P.3d 1007].)

**2651. Trying to Prevent an Executive Officer From Performing
Duty (Pen. Code, § 69)**

The defendant is charged [in Count _____] with trying to (prevent/ [or] deter) an executive officer from performing that officer's duty [in violation of Penal Code section 69].

To prove that the defendant is guilty of this crime, the People must prove that:

1. The defendant willfully and unlawfully used (violence/ [or] a threat of violence) to try to (prevent/ [or] deter) an executive officer from performing the officer's lawful duty;

AND

2. When the defendant acted, (he/she) intended to (prevent/ [or] deter) the executive officer from performing the officer's lawful duty.

Someone commits an act *willfully* when he or she does it willingly or on purpose.

An *executive officer* is a government official who may use his or her own discretion in performing his or her job duties. [(A/An) _____ <insert title, e.g., peace officer, commissioner, etc.> is an *executive officer*.]

The executive officer does not need to be performing his or her job duties at the time the threat is communicated.

A threat may be oral or written and may be implied by a pattern of conduct or a combination of statements and conduct.

[Photographing or recording an *executive officer* while the officer is in a public place or while the person photographing or recording is in a place where he or she has the right to be is not, by itself, a crime.]

[The defendant does not have to communicate the threat directly to the intended victim, but may do so through someone else. The defendant must, however, intend that (his/her) statement be taken as a threat by the intended victim.]

[Someone who intends that a statement be understood as a threat does not have to actually intend to carry out the threatened act [or intend to have someone else do so].]

[A sworn member of _____ <insert name of agency that employs peace officer>, authorized by _____ <insert appropriate section from Pen. Code, § 830 et seq.> to _____ <describe statutory authority>, is a *peace officer*.]

[The duties of (a/an) _____ <insert title of officer specified in Pen. Code, § 830 et seq.> **include** _____ <insert job duties>.]

<When lawful performance is an issue, give the following paragraph and Instruction 2670, Lawful Performance: Peace Officer.>

[A peace officer is not lawfully performing his or her duties if he or she is (unlawfully arresting or detaining someone/ [or] using unreasonable or excessive force in his or her duties). Instruction 2670 explains (when an arrest or detention is unlawful/ [and] when force is unreasonable or excessive).]

New January 2006; Revised August 2014, August 2016

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

In order to be “performing a lawful duty,” an executive officer, including a peace officer, must be acting lawfully. (*In re Manuel G.* (1997) 16 Cal.4th 805, 816–817 [66 Cal.Rptr.2d 701, 941 P.2d 880]; *People v. Gonzalez* (1990) 51 Cal.3d 1179, 1217 [275 Cal.Rptr. 729, 800 P.2d 1159].) The court has a **sua sponte** duty to instruct on lawful performance and the defendant’s reliance on self-defense as it relates to the use of excessive force when this is an issue in the case. (*People v. Castain* (1981) 122 Cal.App.3d 138, 145 [175 Cal.Rptr. 651]; *People v. Olguin* (1981) 119 Cal.App.3d 39, 46–47 [173 Cal.Rptr. 663]; *People v. White* (1980) 101 Cal.App.3d 161, 167–168 [161 Cal.Rptr. 541].)

For this offense, “the relevant factor is simply the lawfulness of the official conduct that the defendant (through threat or violence) has attempted to deter, and not the lawfulness (or official nature) of the conduct in which the officer is engaged at the time the threat is made.” (*In re Manuel G.*, *supra*, 16 Cal.4th at p. 817.) Thus, if the evidence supports the conclusion that the defendant attempted to deter the officer’s current performance of a duty, the court should instruct on the lawfulness of that duty. (*Ibid.*) Where the evidences supports the conclusion that the defendant attempted to deter the officer from performing a duty in the future, the court should only instruct on the lawfulness of that future duty. (*Ibid.*)

If there is an issue in the case as to the lawful performance of a duty by a peace officer, give the last bracketed paragraph and CALCRIM No. 2670, *Lawful Performance: Peace Officer*.

If a different executive officer was the alleged victim, the court will need to draft an appropriate definition of lawful duty if this is an issue in the case.

AUTHORITY

- Elements. Pen. Code, § 69.

- Specific Intent Required. *People v. Gutierrez* (2002) 28 Cal.4th 1083, 1154 [124 Cal.Rptr.2d 373, 52 P.3d 572].
- Immediate Ability to Carry Out Threat Not Required. *People v. Hines* (1997) 15 Cal.4th 997, 1061 [64 Cal.Rptr.2d 594, 938 P.2d 388].
- Lawful Performance Element to Attempting to Deter. *In re Manuel G.* (1997) 16 Cal.4th 805, 816–817 [66 Cal.Rptr.2d 701, 941 P.2d 880].
- Statute Constitutional. *People v. Hines* (1997) 15 Cal.4th 997, 1061 [64 Cal.Rptr.2d 594, 938 P.2d 388].
- Merely Photographing or Recording Officers Not a Crime. Pen. Code, § 69(b).

Secondary Sources

2 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against Governmental Authority, § 128.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, § 142.11A[1][b] (Matthew Bender).

RELATED ISSUES***Resisting an Officer Not Lesser Included Offense***

Resisting an officer, Penal Code section 148(a), is not a lesser included offense of attempting by force or violence to deter an officer. (*People v. Smith* (2013) 57 Cal.4th 232, 240–245 [159 Cal.Rptr.3d 57, 303 P.3d 368].)

Statute as Written Is Overbroad

The statute as written would prohibit lawful threatening conduct. To avoid overbreadth, this instruction requires that the defendant act both “willfully” and “unlawfully.” (*People v. Superior Court (Anderson)* (1984) 151 Cal.App.3d 893, 895–896 [199 Cal.Rptr. 150].)

State of Mind of Victim Irrelevant

Unlike other threat crimes, the state of mind of the intended victim is irrelevant. (*People v. Gutierrez* (2002) 28 Cal.4th 1083, 1153 [124 Cal.Rptr.2d 373, 52 P.3d 572]; *People v. Hines* (1997) 15 Cal.4th 997, 1061 fn. 15 [64 Cal.Rptr.2d 594, 938 P.2d 388].)

Immediate Ability to Carry Out Threat Not Required

“As long as the threat reasonably appears to be a serious expression of intention to inflict bodily harm and its circumstances are such that there is a reasonable tendency to produce in the victim a fear that the threat will be carried out, a statute proscribing such threats is not unconstitutional for lacking a requirement of immediacy or imminence. Thus, threats may be constitutionally prohibited even when there is no *immediate* danger that they will be carried out.” (*People v. Hines* (1997) 15 Cal.4th 997, 1061 [64 Cal.Rptr.2d 594, 938 P.2d 388] [quoting *In re M.S.* (1995) 10 Cal.4th 698, 714 [42 Cal.Rptr.2d 355, 896 P.2d 1365], citation and internal quotation marks removed, emphasis in original]; see also *People v. Gudger* (1994) 29 Cal.App.4th 310, 320–321 [34 Cal.Rptr.2d 510]; *Watts v. United States*

CRIMES AGAINST GOVERNMENT

CALCRIM No. 2651

(1969) 394 U.S. 705, 707 [89 S.Ct. 1399, 22 L.Ed.2d 664]; *United States v. Kelner* (2d Cir. 1976) 534 F.2d 1020, 1027.)

**2652. Resisting an Executive Officer in Performance of Duty
(Pen. Code, § 69)**

The defendant is charged [in Count _____] with resisting an executive officer in the performance of that officer's duty [in violation of Penal Code section 69].

To prove that the defendant is guilty of this crime, the People must prove that:

1. The defendant [unlawfully] used force [or violence] to resist an executive officer;
2. When the defendant acted, the officer was performing (his/her) lawful duty;

AND

3. When the defendant acted, (he/she) knew the executive officer was performing (his/her) duty.

An executive officer is a government official who may use his or her own discretion in performing his or her job duties. [(A/An) _____ <insert title, e.g., peace officer, commissioner, etc.> is an executive officer.]

[A sworn member of _____ <insert name of agency that employs peace officer>, authorized by _____ <insert appropriate section from Pen. Code, § 830 et seq.> to _____ <describe statutory authority>, is a peace officer.]

[The duties of (a/an) _____ <insert title of officer specified in Pen. Code, § 830 et seq.> include _____ <insert job duties>.]

[Taking a photograph or making an audio or video recording of an executive officer while the officer is in a public place or the person taking the photograph or making the recording is in a place where he or she has the right to be is not, by itself, a crime.]

<When lawful performance is an issue, give the following paragraph and Instruction 2670, Lawful Performance: Peace Officer.>

[A peace officer is not lawfully performing his or her duties if he or she is (unlawfully arresting or detaining someone/ [or] using unreasonable or excessive force in his or her duties). Instruction 2670 explains (when an arrest or detention is unlawful/ [and] when force is unreasonable or excessive).]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

In order to be “performing a lawful duty,” an executive officer, including a peace officer, must be acting lawfully. (*In re Manuel G.* (1997) 16 Cal.4th 805, 816 [66 Cal.Rptr.2d 701, 941 P.2d 880]; *People v. Gonzalez* (1990) 51 Cal.3d 1179, 1217 [275 Cal.Rptr. 729, 800 P.2d 1159].) The court has a **sua sponte** duty to instruct on lawful performance and the defendant’s reliance on self-defense as it relates to the use of excessive force when this is an issue in the case. (*People v. Castain* (1981) 122 Cal.App.3d 138, 145 [175 Cal.Rptr. 651]; *People v. Olguin* (1981) 119 Cal.App.3d 39, 46–47 [173 Cal.Rptr. 663]; *People v. White* (1980) 101 Cal.App.3d 161, 167–168 [161 Cal.Rptr. 541].)

If there is an issue in the case as to the lawful performance of a duty by a peace officer, give the last bracketed paragraph and CALCRIM No. 2670, *Lawful Performance: Peace Officer*.

If a different executive officer was the alleged victim, the court will need to draft an appropriate definition of lawful duty if this is an issue in the case.

AUTHORITY

- Elements. Pen. Code, § 69.
- General Intent Offense. *People v. Roberts* (1982) 131 Cal.App.3d Supp. 1, 9 [182 Cal.Rptr. 757].
- Lawful Performance Element to Resisting Officer. *In re Manuel G.* (1997) 16 Cal.4th 805, 816 [66 Cal.Rptr.2d 701, 941 P.2d 880].
- Merely Photographing or Recording Officers Not a Crime. Pen. Code, § 69(b).

Secondary Sources

2 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against Governmental Authority, § 128.

1 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 11, *Arrest*, § 11.06[3] (Matthew Bender).

3 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 73, *Defenses and Justifications*, § 73.15[2] (Matthew Bender).

LESSER INCLUDED OFFENSES

Penal Code section 148(a) is not a lesser included offense of this crime under the statutory elements test, but may be one under the accusatory pleading test. *People v. Smith* (2013) 57 Cal.4th 232, 241–242 [159 Cal.Rptr.3d 57, 303 P.3d 368]; see also *People v. Belmares* (2003) 106 Cal.App.4th 19, 26 [130 Cal.Rptr.2d 400] and *People v. Lopez* (2005) 129 Cal.App.4th 1508, 1532 [29 Cal.Rptr.3d 586].

Assault may be a lesser included offense of this crime under the accusatory

pleading test. See *People v. Brown* (2016) 245 Cal.App.4th 140, 153 [199 Cal.Rptr.3d 303].

2653. Taking Firearm or Weapon While Resisting Peace Officer or Public Officer (Pen. Code, § 148(b) & (c))

The defendant is charged [in Count _____] with taking a (firearm/weapon) from a (peace/public) officer while (resisting[,]/obstructing[,]/[or] delaying) the officer in performing or attempting to perform (his/her) duties [in violation of Penal Code section 148].

To prove that the defendant is guilty of this crime, the People must prove that:

1. _____ *<insert officer's name, excluding title>* was a (peace/public) officer lawfully performing or attempting to perform (his/her) duties as a (peace/public) officer;
2. The defendant willfully (resisted[,]/obstructed[,]/ [or] delayed) _____ *<insert officer's name, excluding title>* in the performance of or attempt to perform those duties;
3. When the defendant acted, (he/she) knew, or reasonably should have known, that _____ *<insert officer's name, excluding title>* was a (peace/public) officer performing or attempting to perform (his/her) duties;

[AND]

4. While the defendant (resisted[,]/obstructed[,]/ [or] delayed) _____ *<insert officer's name, excluding title>*, the defendant took or removed a (firearm/weapon) from _____'s *<insert officer's name, excluding title>* person [or immediate presence](;/.).

<Give element 5 when instructing on self-defense or defense of another.>

[AND]

5. The defendant did not act (in self-defense/ [or] in defense of someone else).]

Someone commits an act *willfully* when he or she does it willingly or on purpose. It is not required that he or she intend to break the law, hurt someone else, or gain any advantage.

[A *firearm* is any device designed to be used as a weapon, from which a projectile is discharged or expelled through a barrel by the force of an explosion or other form of combustion.]

[The term *firearm* is defined in another instruction to which you should refer.]

[A person who is employed as a police officer by _____ *<insert name of agency that employs police officer>* is a *peace officer*.]

[A person employed by _____ <insert name of agency that employs peace officer, e.g., “the Department of Fish and Wildlife”> is a **peace officer** if _____ <insert description of facts necessary to make employee a peace officer, e.g., “designated by the director of the agency as a peace officer”>.]

[An officer or employee of _____ <insert name of state or local government agency that employs public officer> is a **public officer**.]

[The duties of (a/an) _____ <insert title of peace or public officer> include _____ <insert job duties>.]

[Taking a photograph or making an audio or video recording of a (peace officer/ [or] public officer) while the officer is in a public place or the person taking the photograph or making the recording is in a place where he or she has the right to be is not, by itself, a crime.]

<When lawful performance is an issue, give the following paragraph and Instruction 2670, Lawful Performance: Peace Officer.>

[A peace officer is not lawfully performing his or her duties if he or she is (unlawfully arresting or detaining someone/ [or] using unreasonable or excessive force in his or her duties). Instruction 2670 explains (when an arrest or detention is unlawful/ [and] when force is unreasonable or excessive).]

New January 2006; Revised February 2012, August 2016

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

If there is sufficient evidence of self-defense or defense of another, the court has a **sua sponte** duty to instruct on the defense. Give bracketed element 5 and any appropriate defense instructions. (See CALCRIM Nos. 3470–3477.)

In addition, the court has a **sua sponte** duty to instruct on defendant’s reliance on self-defense as it relates to the use of excessive force. (*People v. White* (1980) 101 Cal.App.3d 161, 167–168 [161 Cal.Rptr. 541].) If excessive force is an issue, the court has a **sua sponte** duty to instruct the jury that the defendant is not guilty of the offense charged, or any lesser included offense in which lawful performance is an element, if the defendant used reasonable force in response to excessive force. (*People v. Olguin* (1981) 119 Cal.App.3d 39, 46–47 [173 Cal.Rptr. 663].) On request, the court must instruct that the prosecution has the burden of proving the lawfulness of the arrest beyond a reasonable doubt. (*People v. Castain* (1981) 122 Cal.App.3d 138, 145 [175 Cal.Rptr. 651].) If lawful performance of a peace officer is an issue, give the bracketed paragraph on lawful performance and the appropriate

portions of CALCRIM No. 2670, *Lawful Performance: Peace Officer*. If lawful performance by a public officer is an issue, the court must draft an appropriate instruction depending on the duties of the officer.

Give the bracketed definition of “firearm” unless the court has already given the definition in other instructions. In such cases, the court may give the bracketed sentence stating that the term is defined elsewhere.

The jury must determine whether the alleged victim is a peace officer. (*People v. Brown* (1988) 46 Cal.3d 432, 444–445 [250 Cal.Rptr. 604, 758 P.2d 1135].) The court may instruct the jury on the appropriate definition of “peace officer” from the statute (e.g., “a Garden Grove Regular Police Officer and a Garden Grove Reserve Police Officer are peace officers”). (*Ibid.*) However, the court may not instruct the jury that the alleged victim was a peace officer as a matter of law (e.g., “Officer Reed was a peace officer”). (*Ibid.*) If the alleged victim is a police officer, give the bracketed sentence that begins with “A person employed as a police officer.” If the alleged victim is another type of peace officer, give the bracketed sentence that begins with “A person employed by.”

The court may give the bracketed sentence that begins, “The duties of a _____ <insert title . . . > include,” on request. The court may insert a description of the officer’s duties such as “the correct service of a facially valid search warrant.” (*People v. Gonzalez* (1990) 51 Cal.3d 1179, 1222 [275 Cal.Rptr. 729, 800 P.2d 1159].)

Related Instructions

CALCRIM No. 2654, *Intentionally Taking or Attempting to Take Firearm From Peace Officer or Public Officer*.

AUTHORITY

- Elements. Pen. Code, § 148(b) & (c); see *In re Muhammed C.* (2002) 95 Cal.App.4th 1325, 1329 [116 Cal.Rptr.2d 21] [elements of Pen. Code, § 148(a) offense]; *Nuno v. County of San Bernardino* (1999) 58 F.Supp.2d 1127, 1133 [officer lawfully performing duties]; *People v. Lopez* (1986) 188 Cal.App.3d 592, 599–600 [233 Cal.Rptr. 207] [knowledge that other person is an officer].
- Firearm Defined. Pen. Code, § 16520.
- Multiple Violations. Pen. Code, § 148(e).
- Peace Officer Defined. Pen. Code, § 830 et seq.
- Public Officer. See, e.g., Pen. Code, §§ 831(a) [custodial officer], 831.4 [sheriff’s or police security officer], 831.5 [custodial officer], 831.6 [transportation officer], 3089 [county parole officer]; *In re Frederick B.* (1987) 192 Cal.App.3d 79, 89–90 [237 Cal.Rptr. 338], disapproved on other grounds in *In re Randy G.* (2001) 26 Cal.4th 556, 567, fn. 2 [110 Cal.Rptr.2d 516, 28 P.3d 239] [“public officers” is broader category than “peace officers”]; see also Pen. Code, § 836.5(a) [authority to arrest without warrant].
- Public Official Defined. Gov. Code, § 82048; see *In re Eddie D.* (1991) 235

Cal.App.3d 417, 421 [286 Cal.Rptr. 684].

- Unlawful Arrest or Act by Officer. Pen. Code, § 148(f); *Franklin v. Riverside County* (1997) 971 F.Supp. 1332, 1335–1336; *People v. Curtis* (1969) 70 Cal.2d 347, 354 [74 Cal.Rptr. 713, 450 P.2d 33]; *Susag v. City of Lake Forest* (2002) 94 Cal.App.4th 1401, 1409 [115 Cal.Rptr.2d 269].
- Delaying Officer From Performing Duties. *People v. Allen* (1980) 109 Cal.App.3d 981, 985–986, 987 [167 Cal.Rptr. 502].
- General Intent Crime. *In re Muhammed C.* (2002) 95 Cal.App.4th 1325, 1329 [116 Cal.Rptr.2d 21]; *People v. Matthews* (1999) 70 Cal.App.4th 164, 175 [82 Cal.Rptr.2d 502].
- “Take” or “Remove” Defined. *People v. Matthews* (1999) 70 Cal.App.4th 164, 173, 175 [82 Cal.Rptr.2d 502].
- Verbal Resistance or Obstruction. *People v. Quiroga* (1993) 16 Cal.App.4th 961, 968, 970–972 [20 Cal.Rptr.2d 446] [nondisclosure of identity following arrest for felony, not misdemeanor]; *People v. Green* (1997) 51 Cal.App.4th 1433, 1438 [59 Cal.Rptr.2d 913] [attempt to intimidate suspected victim into denying offense].
- Merely Photographing or Recording Officers Not a Crime. Pen. Code, § 148(g).

Secondary Sources

2 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against Governmental Authority, §§ 18–20.

1 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 11, *Arrest*, § 11.06[3] (Matthew Bender).

LESSER INCLUDED OFFENSES

- Attempted Removal of Firearm or Weapon. Pen. Code, §§ 663, 148(b) & (c).
- Misdemeanor Resisting Arrest. Pen. Code, § 148(a)(1).

RELATED ISSUES

Multiple Violations

A person may be convicted of multiple violations of this section if there are multiple officer victims. (Pen. Code, § 148(e).) However, a person may not be convicted of both resisting an officer in violation of Penal Code section 148(a) and removing a weapon or firearm from an officer in violation of Penal Code section 148(b), (c), or (d) if the resistance and removal were committed against the same officer. (Pen. Code, § 148(e).)

Other Forms of Resistance or Interference

It is a misdemeanor under Penal Code section 148(a)(1) to willfully resist, delay, or obstruct any emergency medical technician in discharging or attempting to discharge his or her duties of employment. (See Health & Saf. Code, § 1797

[defining emergency medical technician].) It is also a misdemeanor under Penal Code section 148(a)(2) to knowingly and maliciously interrupt, disrupt, impede, or otherwise interfere with the transmission of a communication over a public safety radio frequency.

**2654. Intentionally Taking or Attempting to Take Firearm From
Peace Officer or Public Officer (Pen. Code, § 148(d))**

The defendant is charged [in Count _____] with intentionally (taking/ [or] attempting to take) a firearm from a (peace/public) officer while the officer was performing (his/her) duties [in violation of Penal Code section 148(d)].

To prove that the defendant is guilty of this crime, the People must prove that:

1. _____ *<insert officer's name, excluding title>* was a (peace/ public) officer lawfully performing (his/her) duties as a (peace/ public) officer;
2. The defendant (took or removed/ [or] attempted to take or remove) a firearm from _____'s *<insert officer's name, excluding title>* person [or immediate presence];
3. When the defendant acted, (he/she) intended to take or remove the firearm from _____'s *<insert officer's name, excluding title>* person [or immediate presence];

[AND]

4. When the defendant acted, (he/she) knew, or reasonably should have known, that _____ *<insert officer's name, excluding title>* was a (peace/public) officer performing (his/her) duties(;/.)
- <Give element 5 when instructing on self-defense or defense of another.>*

[AND]

5. The defendant did not act (in self-defense/ [or] in defense of someone else).]

To prove that the defendant intended to take or remove a firearm from _____ *<insert officer's name, excluding title>*, the People must prove [at least one of] the following:

- [1. The defendant unfastened _____'s *<insert officer's name, excluding title>* holster strap.]
- [2. The defendant partially removed the firearm from _____'s *<insert officer's name, excluding title>* holster.]
- [3. The defendant released the safety on _____'s *<insert officer's name, excluding title>* firearm.]
- [4. (a) The defendant said that (he/she) intended to remove the firearm from _____ *<insert officer's name, excluding title>*; (b) the defendant actually touched the firearm; and (c) an

independent witness has given testimony that you believe, which supports the conclusion that the defendant made the statement about (his/her) intent and actually touched the firearm.]

- [5. (a) The defendant actually had (his/her) hand on the firearm; (b) the defendant tried to take it away from _____ *<insert officer's name, excluding title>*, who was holding it; and (c) an independent witness has given testimony that you believe, which supports the conclusion that the defendant actually had (his/her) hand on the firearm and tried to take it away from the officer.]
- [6. The defendant's fingerprint[s] (was/were) found on the firearm or holster.]
- [7. Physical evidence authenticated by a scientifically verifiable procedure establishes that the defendant touched the firearm.]
- [8. _____'s *<insert officer's name, excluding title>* firearm fell during a struggle and the defendant attempted to pick it up.]

[A person may intend to take a weapon from an officer without intending to permanently deprive the officer of the firearm.]

[A *firearm* is any device designed to be used as a weapon, from which a projectile is discharged or expelled through a barrel by the force of an explosion or other form of combustion.]

[The term *firearm* is defined in another instruction to which you should refer.]

[A person who is employed as a police officer by _____ *<insert name of agency that employs police officer>* is a **peace officer**.]

[A person employed by _____ *<insert name of agency that employs peace officer, e.g., "the Department of Fish and Wildlife">* is a **peace officer** if _____ *<insert description of facts necessary to make employee a peace officer, e.g., "designated by the director of the agency as a peace officer">*.]

[An officer or employee of _____ *<insert name of state or local government agency that employs public officer>* is a **public officer**.]

[The duties of (a/an) _____ *<insert title of peace or public officer>* include _____ *<insert job duties>*.]

<When lawful performance is an issue, give the following paragraph and Instruction 2670, Lawful Performance: Peace Officer.>

[A peace officer is not lawfully performing his or her duties if he or she is (unlawfully arresting or detaining someone/ [or] using unreasonable or excessive force in his or her duties). Instruction 2670 explains (when an arrest or detention is unlawful/ [and] when force is unreasonable or

excessive).]

New January 2006; Revised February 2012

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime. Depending on the evidence in the case, give the appropriate bracketed paragraph or paragraphs describing direct but ineffectual acts that establish defendant's specific intent to remove or take a firearm. (See Pen. Code, § 148(d)(1)–(8).)

If there is sufficient evidence of self-defense or defense of another, the court has a **sua sponte** duty to instruct on the defense. Give bracketed element 5 and any appropriate defense instructions. (See CALCRIM Nos. 3470–3477.)

In addition, the court has a **sua sponte** duty to instruct on defendant's reliance on self-defense as it relates to the use of excessive force. (*People v. White* (1980) 101 Cal.App.3d 161, 167–168 [161 Cal.Rptr. 541].) If excessive force is an issue, the court has a **sua sponte** duty to instruct the jury that the defendant is not guilty of the offense charged, or any lesser included offense in which lawful performance is an element, if the defendant used reasonable force in response to excessive force. (*People v. Olguin* (1981) 119 Cal.App.3d 39, 46–47 [173 Cal.Rptr. 663].) On request, the court must instruct that the prosecution has the burden of proving the lawfulness of the arrest beyond a reasonable doubt. (*People v. Castain* (1981) 122 Cal.App.3d 138, 145 [175 Cal.Rptr. 651].) If lawful performance of a peace officer is an issue, give the bracketed paragraph on lawful performance and the appropriate portions of CALCRIM No. 2670, *Lawful Performance: Peace Officer*. If lawful performance by a public officer is an issue, the court must draft an appropriate instruction depending on the duties of the officer.

Give the bracketed definition of “firearm” unless the court has already given the definition in other instructions. In such cases, the court may give the bracketed sentence stating that the term is defined elsewhere.

The jury must determine whether the alleged victim is a peace officer. (*People v. Brown* (1988) 46 Cal.3d 432, 444–445 [250 Cal.Rptr. 604, 758 P.2d 1135].) The court may instruct the jury on the appropriate definition of “peace officer” from the statute (e.g., “a Garden Grove Regular Police Officer and a Garden Grove Reserve Police Officer are peace officers”). (*Ibid.*) However, the court may not instruct the jury that the alleged victim was a peace officer as a matter of law (e.g., “Officer Reed was a peace officer”). (*Ibid.*) If the alleged victim is a police officer, give the bracketed sentence that begins with “A person employed as a police officer.” If the alleged victim is another type of peace officer, give the bracketed sentence that begins with “A person employed by.”

The court may give the bracketed sentence that begins, “The duties of a

_____ <insert title . . . > include,” on request. The court may insert a description of the officer’s duties such as “the correct service of a facially valid search warrant.” (*People v. Gonzalez* (1990) 51 Cal.3d 1179, 1222 [275 Cal.Rptr. 729, 800 P.2d 1159].)

Related Instructions

CALCRIM No. 2653, *Taking Firearm or Weapon While Resisting Peace Officer or Public Officer*.

CALCRIM No. 1801, *Theft: Degrees* (theft of firearm from an officer).

AUTHORITY

- Elements. Pen. Code, § 148(d); see *In re Muhammed C.* (2002) 95 Cal.App.4th 1325, 1329 [116 Cal.Rptr.2d 21] [elements of Pen. Code, § 148(a) offense]; *Nuno v. County of San Bernardino* (1999) 58 F.Supp.2d 1127, 1133 [officer lawfully performing duties]; *People v. Lopez* (1986) 188 Cal.App.3d 592, 599–600 [233 Cal.Rptr. 207] [knowledge that other person is an officer].
- Firearm Defined. Pen. Code, § 16520.
- Multiple Violations. Pen. Code, § 148(e).
- Peace Officer Defined. Pen. Code, § 830 et seq.
- Public Officer. See, e.g., Pen. Code, §§ 831(a) [custodial officer], 831.4 [sheriff’s or police security officer], 831.5 [custodial officer], 831.6 [transportation officer], 3089 [county parole officer]; *In re Frederick B.* (1987) 192 Cal.App.3d 79, 89–90 [237 Cal.Rptr. 338] [“public officers” is broader category than “peace officers”], disapproved on other grounds in *In re Randy G.* (2001) 26 Cal.4th 556, 567, fn. 2 [110 Cal.Rptr.2d 516, 28 P.3d 239]; see also Pen. Code, § 836.5(a) [authority to arrest without warrant].
- Public Official Defined. Gov. Code, § 82048; see *In re Eddie D.* (1991) 235 Cal.App.3d 417, 421 [286 Cal.Rptr. 684].
- Unlawful Arrest or Act by Officer. Pen. Code, § 148(f); *Franklin v. Riverside County* (1997) 971 F.Supp. 1332, 1335–1336; *People v. Curtis* (1969) 70 Cal.2d 347, 354 [74 Cal.Rptr. 713, 450 P.2d 33]; *Susag v. City of Lake Forest* (2002) 94 Cal.App.4th 1401, 1409 [115 Cal.Rptr.2d 269].
- “Take” or “Remove” Defined. See *People v. Matthews* (1999) 70 Cal.App.4th 164, 173, 175 [82 Cal.Rptr.2d 502] [in context of Pen. Code, § 148(a)].

Secondary Sources

2 Witkin & Epstein, *California Criminal Law* (3d ed. 2000) Crimes Against Governmental Authority, §§ 18–20.

1 Millman, Sevilla & Tarlow, *California Criminal Defense Practice*, Ch. 11, *Arrest*, § 11.06[3][b] (Matthew Bender).

RELATED ISSUES

See the Related Issues section to CALCRIM No. 2653, *Taking Firearm or Weapon*

While Resisting Peace Officer or Public Officer.

**2655. Causing Death or Serious Bodily Injury While Resisting
Peace Officer (Pen. Code, § 148.10(a) & (b))**

The defendant is charged [in Count _____] with causing (the death of/serious bodily injury to) a peace officer performing (his/her) duties [in violation of Penal Code section 148.10].

To prove that the defendant is guilty of this crime, the People must prove that:

1. _____ *<insert officer's name, excluding title>* was a peace officer lawfully performing or attempting to perform (his/her) duties as a peace officer;
2. The defendant willfully resisted _____ *<insert officer's name, excluding title>* in the performance of or the attempt to perform (his/her) duties;
3. When the defendant acted, (he/she) knew, or reasonably should have known, that _____ *<insert officer's name, excluding title>* was a peace officer performing or attempting to perform (his/her) duties;
4. _____'s *<insert officer's name, excluding title>* actions were reasonable, based on the facts or circumstances confronting (him/her) at the time;
5. The detention and arrest of (the defendant/ _____ *<insert name of person other than defendant who was arrested>*) were lawful and there was probable cause to detain;

[AND]

6. The defendant's willful resistance caused (the death of/serious bodily injury to) _____ *<insert officer's name, excluding title>(:/.)*

<Give element 7 when instructing on self-defense or defense of another.>

[AND]

7. The defendant did not act (in self-defense/ [or] in defense of someone else).]

Someone commits an act *willfully* when he or she does it willingly or on purpose. It is not required that he or she intend to break the law, hurt someone else, or gain any advantage.

In order to prove that _____'s *<insert officer's name, excluding title>* (death/serious bodily injury) was *caused* by the defendant's willful resistance, the People must prove that:

1. A reasonable person in the defendant's position would have foreseen that (his/her) willful resistance could begin a chain of events likely to result in the officer's death or serious bodily injury;
2. Defendant's willful resistance was a direct and substantial factor in causing _____'s *<insert officer's name, excluding title>* (death/serious bodily injury);

AND

3. _____'s *<insert officer's name, excluding title>* (death/serious bodily injury) would not have happened if the defendant had not willfully resisted _____ *<insert officer's name, excluding title>* from performing or attempting to perform (his/her) duties.

A *substantial factor* is more than a trivial or remote factor. However, it does not need to be the only factor that caused _____'s *<insert officer's name, excluding title>* (death/serious bodily injury).

[Willful resistance may include fleeing from the officer.]

[A *serious bodily injury* means a serious impairment of physical condition. Such an injury may include[, but is not limited to]: (loss of consciousness/ concussion/ bone fracture/ protracted loss or impairment of function of any bodily member or organ/ a wound requiring extensive suturing/ [and] serious disfigurement).]

[A person who is employed as a police officer by _____ *<insert name of agency that employs police officer>* is a *peace officer*.]

[A person employed by _____ *<insert name of agency that employs peace officer, e.g., "the Department of Fish and Wildlife">* is a *peace officer* if _____ *<insert description of facts necessary to make employee a peace officer, e.g., "designated by the director of the agency as a peace officer">*.]

[The duties of (a/an) _____ *<insert title of peace officer>* include _____ *<insert job duties>*.]

[Taking a photograph or making an audio or video recording of an *executive officer* while the officer is in a public place or the person taking the photograph or making the recording is in a place where he or she has the right to be is not, by itself, a crime.]

<When lawful performance is an issue, give the following paragraph and Instruction 2670, Lawful Performance: Peace Officer.>

[A peace officer is not lawfully performing his or her duties if he or she is (unlawfully arresting or detaining someone/ [or] using unreasonable

or excessive force in his or her duties). Instruction 2670 explains (when an arrest or detention is unlawful/ [and] when force is unreasonable or excessive).]

New January 2006; Revised August 2006, August 2016

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

If there is sufficient evidence of self-defense or defense of another, the court has a **sua sponte** duty to instruct on the defense. Give bracketed element 7 and any appropriate defense instructions. (See CALCRIM Nos. 3470–3477.)

In addition, the court has a **sua sponte** duty to instruct on defendant's reliance on self-defense as it relates to the use of excessive force. (*People v. White* (1980) 101 Cal.App.3d 161, 167–168 [161 Cal.Rptr. 541].) If excessive force is an issue, the court has a **sua sponte** duty to instruct the jury that the defendant is not guilty of the offense charged, or any lesser included offense in which lawful performance is an element, if the defendant used reasonable force in response to excessive force. (*People v. Olguin* (1981) 119 Cal.App.3d 39, 46–47 [173 Cal.Rptr. 663].) On request, the court must instruct that the prosecution has the burden of proving the lawfulness of the arrest beyond a reasonable doubt. (*People v. Castain* (1981) 122 Cal.App.3d 138, 145 [175 Cal.Rptr. 651].) If lawful performance of a peace officer is an issue, give the bracketed paragraph on lawful performance and the appropriate portions of CALCRIM No. 2670, *Lawful Performance: Peace Officer*.

The jury must determine whether the alleged victim is a peace officer. (*People v. Brown* (1988) 46 Cal.3d 432, 444–445 [250 Cal.Rptr. 604, 758 P.2d 1135].) The court may instruct the jury on the appropriate definition of “peace officer” from the statute (e.g., “a Garden Grove Regular Police Officer and a Garden Grove Reserve Police Officer are peace officers”). (*Ibid.*) However, the court may not instruct the jury that the alleged victim was a peace officer as a matter of law (e.g., “Officer Reed was a peace officer”). (*Ibid.*) If the alleged victim is a police officer, give the bracketed sentence that begins with “A person employed as a police officer.” If the alleged victim is another type of peace officer, give the bracketed sentence that begins with “A person employed by.”

The court may give the bracketed sentence that begins, “The duties of a _____ <insert title . . . > include,” on request. The court may insert a description of the officer's duties such as “the correct service of a facially valid search warrant.” (*People v. Gonzalez* (1990) 51 Cal.3d 1179, 1222 [275 Cal.Rptr. 729, 800 P.2d 1159].)

AUTHORITY

- Elements. Pen. Code, § 148.10(a) & (b).

- Peace Officer Defined. Pen. Code, § 830 et seq.
- Serious Bodily Injury Defined. Pen. Code, §§ 148.10(d), 243(f)(4); *People v. Taylor* (2004) 118 Cal.App.4th 11, 25, fn. 4 [12 Cal.Rptr.3d 693].
- Willful Resistance Includes Flight. *People v. Superior Court (Ferguson)* (2005) 132 Cal.App.4th 1525, 1535 [34 Cal.Rptr.3d 481].
- Unlawful Arrest or Act by Officer. Pen. Code, § 148(f); *Franklin v. Riverside County* (1997) 971 F.Supp. 1332, 1335–1336; *People v. Curtis* (1969) 70 Cal.2d 347, 354 [74 Cal.Rptr. 713, 450 P.2d 33]; *Susag v. City of Lake Forest* (2002) 94 Cal.App.4th 1401, 1409 [115 Cal.Rptr.2d 269].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against Governmental Authority, § 21.

1 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 11, *Arrest*, § 11.06[3][b] (Matthew Bender).

LESSER INCLUDED OFFENSES

- Misdemeanor Resisting Arrest. Pen. Code, § 148(a)(1).

RELATED ISSUES***Exclusions***

Penal Code section 148.10 “does not apply to conduct that occurs during labor picketing, demonstrations, or disturbing the peace.” (Pen. Code, § 148.10(c).)

Photographing or Recording Officers

Penal Code section 148(g) provides that merely photographing or recording a public officer or peace officer under certain conditions is not a crime. This new provision limits its application to violations of subdivision (a) of the same statute, however. Until the legislature or courts of review provide further guidance, it is unclear whether section 148(g) would apply to violations of Penal Code section 148.10.

**2656. Resisting Peace Officer, Public Officer, or EMT (Pen. Code,
§ 148(a))**

The defendant is charged [in Count _____] with (resisting[,]/ [or] obstructing[,]/ [or] delaying) a (peace officer/public officer/emergency medical technician) in the performance or attempted performance of (his/her) duties [in violation of Penal Code section 148(a)].

To prove that the defendant is guilty of this crime, the People must prove that:

1. _____ *<insert name, excluding title>* was (a/an) (peace officer/public officer/emergency medical technician) lawfully performing or attempting to perform (his/her) duties as a (peace officer/public officer/emergency medical technician);
2. The defendant willfully (resisted[,]/ [or] obstructed[,]/ [or] delayed) _____ *<insert name, excluding title>* in the performance or attempted performance of those duties;

AND

3. When the defendant acted, (he/she) knew, or reasonably should have known, that _____ *<insert name, excluding title>* was (a/an) (peace officer/public officer/emergency medical technician) performing or attempting to perform (his/her) duties.

Someone commits an act *willfully* when he or she does it willingly or on purpose. It is not required that he or she intend to break the law, hurt someone else, or gain any advantage.

[A person who is employed as a police officer by _____ *<insert name of agency that employs police officer>* is a **peace officer**.]

[A person employed by _____ *<insert name of agency that employs peace officer, e.g., "the Department of Fish and Wildlife">* is a **peace officer** if _____ *<insert description of facts necessary to make employee a peace officer, e.g., "designated by the director of the agency as a peace officer">*.]

[An officer or employee of _____ *<insert name of state or local government agency that employs public officer>* is a **public officer**.]

[An **emergency medical technician** is someone who holds a valid certificate as an emergency medical technician.]

[The duties of (a/an) _____ *<insert title of peace officer, public officer, or emergency medical technician>* include _____ *<insert job duties>*.]

[Taking a photograph or making an audio or video recording of a

(peace officer/public officer/emergency medical technician) while the officer is in a public place or the person taking the photograph or making the recording is in a place where he or she has the right to be is not, by itself, a crime.]

<When lawful performance is an issue, give the following paragraph and Instruction 2670, Lawful Performance: Peace Officer.>

[A peace officer is not lawfully performing his or her duties if he or she is (unlawfully arresting or detaining someone/ [or] using unreasonable or excessive force in his or her duties). Instruction 2670 explains (when an arrest or detention is unlawful/ [and] when force is unreasonable or excessive).]

[[The People allege that the defendant (resisted[,]/ [or] obstructed[,]/ [or] delayed) _____ *<insert name, excluding title>* by doing the following: _____ *<insert description of acts when multiple acts alleged>*.] You may not find the defendant guilty unless you all agree that the People have proved that the defendant committed at least one of the alleged acts of (resisting[,]/ [or] obstructing[,]/ [or] delaying) a (peace officer/public officer/emergency medical technician) who was lawfully performing his or her duties, and you all agree on which act (he/she) committed.]

[If a person intentionally goes limp, requiring an officer to drag or carry the person in order to accomplish a lawful arrest, that person may have willfully (resisted[,]/ [or] obstructed[,]/ [or] delayed) the officer if all the other requirements are met.]

New January 2006; Revised June 2007, August 2016

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

The court may use the optional bracketed language in the penultimate paragraph to insert a description of the multiple acts alleged if appropriate.

“[I]f a defendant is charged with violating section 148 and the arrest is found to be unlawful, a defendant cannot be convicted of that section.” (*People v. White* (1980) 101 Cal.App.3d 161, 166 [161 Cal.Rptr. 541].) An unlawful arrest includes both an arrest made without legal grounds and an arrest made with excessive force. (*Id.* at p. 167.) “[D]isputed facts bearing on the issue of legal cause must be submitted to the jury considering an engaged-in-duty element.” (*People v. Gonzalez* (1990) 51 Cal.3d 1179, 1217 [275 Cal.Rptr. 729, 800 P.2d 1159].) The court has a **sua sponte** duty to instruct that the defendant is not guilty of the offense charged if the arrest was unlawful. (*People v. Olguin* (1981) 119 Cal.App.3d 39, 46–47 [173 Cal.Rptr.

663].) On request, the court must instruct that the prosecution has the burden of proving the lawfulness of an arrest beyond a reasonable doubt. (*People v. Castain* (1981) 122 Cal.App.3d 138, 145 [175 Cal.Rptr. 651].)

If lawful performance is an issue, give the bracketed paragraph on lawful performance and the appropriate portions of CALCRIM No. 2670, *Lawful Performance: Peace Officer*. When giving the portion of CALCRIM No. 2670 on the “use of force,” the court **must** either delete the following sentence or specify that this sentence does not apply to a charge of violating Penal Code section 148: “If a person knows, or reasonably should know, that a peace officer is arresting or detaining him or her, the person must not use force or any weapon to resist an officer’s use of reasonable force.” (*People v. White, supra*, 101 Cal.App.3d at pp. 168–169 [court must clarify that Pen. Code, § 834a does not apply to charge under section 148].)

If the prosecution alleges multiple, distinct acts of resistance, the court has a **sua sponte** duty to instruct on unanimity. (*People v. Moreno* (1973) 32 Cal.App.3d Supp. 1, 9 [108 Cal.Rptr. 338].) Give CALCRIM No. 3500, *Unanimity*, if needed.

The jury must determine whether the alleged victim is a peace officer. (*People v. Brown* (1988) 46 Cal.3d 432, 444–445 [250 Cal.Rptr. 604, 758 P.2d 1135].) The court may instruct the jury on the appropriate definition of “peace officer” from the statute (e.g., “a Garden Grove Regular Police Officer and a Garden Grove Reserve Police Officer are peace officers”). (*Ibid.*) However, the court may not instruct the jury that the alleged victim was a peace officer as a matter of law (e.g., “Officer Reed was a peace officer”). (*Ibid.*) If the alleged victim is a police officer, give the bracketed sentence that begins with “A person employed as a police officer.” If the alleged victim is another type of peace officer, give the bracketed sentence that begins with “A person employed by.”

The court may give the bracketed sentence that begins with “The duties of a _____ <insert title . . . > include” on request. The court may insert a description of the alleged victim’s duties such as “the correct service of a facially valid search warrant.” (*People v. Gonzalez* (1990) 51 Cal.3d 1179, 1222 [275 Cal.Rptr. 729, 800 P.2d 1159].)

If the facts indicate passive resistance to arrest, give the bracketed sentence that begins with “If a person goes limp.” (*In re Bacon* (1966) 240 Cal.App.2d 34, 53 [49 Cal.Rptr. 322].)

AUTHORITY

- Elements. Pen. Code, § 148(a); see *In re Muhammed C.* (2002) 95 Cal.App.4th 1325, 1329 [116 Cal.Rptr.2d 21].
- General-Intent Crime. *In re Muhammed C.* (2002) 95 Cal.App.4th 1325, 1329 [116 Cal.Rptr.2d 21].
- Knowledge Required. *People v. Lopez* (1986) 188 Cal.App.3d 592, 599–600 [233 Cal.Rptr. 207].
- Multiple Violations Permissible If Multiple Officers. Pen. Code, § 148(e).

- Peace Officer Defined. Pen. Code, § 830 et seq.
- Emergency Medical Technician Defined. Health & Saf. Code, §§ 1797.80–1797.84.
- Delaying Officer From Performing Duties. *People v. Allen* (1980) 109 Cal.App.3d 981, 985–986, 987 [167 Cal.Rptr. 502].
- Verbal Resistance or Obstruction. *People v. Quiroga* (1993) 16 Cal.App.4th 961, 968, 970–972 [20 Cal.Rptr.2d 446] [nondisclosure of identity following arrest for felony, not misdemeanor]; *People v. Green* (1997) 51 Cal.App.4th 1433, 1438 [59 Cal.Rptr.2d 913] [attempt to intimidate suspected victim into denying offense].
- Passive Resistance to Arrest. *In re Bacon* (1966) 240 Cal.App.2d 34, 53 [49 Cal.Rptr. 322].
- Unanimity. *People v. Moreno* (1973) 32 Cal.App.3d Supp. 1, 9 [108 Cal.Rptr. 338].
- Merely Photographing or Recording Officers Not a Crime. Pen. Code, § 148(g).

Secondary Sources

2 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against Governmental Authority, §§ 18–19.

1 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 11, *Arrest*, § 11.06[3][b] (Matthew Bender).

2657–2669. Reserved for Future Use

F. LAWFUL PERFORMANCE

2670. Lawful Performance: Peace Officer

The People have the burden of proving beyond a reasonable doubt that _____ *<insert name, excluding title>* was lawfully performing (his/her) duties as a peace officer. If the People have not met this burden, you must find the defendant not guilty of _____ *<insert name[s] of all offense[s] with lawful performance as an element>*.

A peace officer is not lawfully performing his or her duties if he or she is (unlawfully arresting or detaining someone/ [or] using unreasonable or excessive force when making or attempting to make an otherwise lawful arrest or detention).

<A. Unlawful Detention>

[A peace officer may legally detain someone if [the person consents to the detention or if]:

1. Specific facts known or apparent to the officer lead him or her to suspect that the person to be detained has been, is, or is about to be involved in activity relating to crime;

AND

2. A reasonable officer who knew the same facts would have the same suspicion.

Any other detention is unlawful.

In deciding whether the detention was lawful, consider evidence of the officer's training and experience and all the circumstances known by the officer when he or she detained the person.]

<B. Unlawful Arrest>

[A peace officer may legally arrest someone [either] (on the basis of an arrest warrant/ [or] if he or she has probable cause to make the arrest).

Any other arrest is unlawful.

Probable cause exists when the facts known to the arresting officer at the time of the arrest would persuade someone of reasonable caution that the person to be arrested has committed a crime.

In deciding whether the arrest was lawful, consider evidence of the officer's training and experience and all the circumstances known by the officer when he or she arrested the person.

<Arrest without warrant for most misdemeanors or infractions>

[In order for an officer to lawfully arrest someone without a warrant

for a misdemeanor or infraction, the officer must have probable cause to believe that the person to be arrested committed a misdemeanor or infraction in the officer's presence.]

<Arrest without warrant for felony or misdemeanor not requiring commission in officer's presence; see Bench Notes>

[In order for an officer to lawfully arrest someone for (a/an) (felony/ [or] _____ *<insert misdemeanor not requiring commission in officer's presence>*) without a warrant, the officer must have probable cause to believe the person to be arrested committed (a/an) (felony/ [or] _____ *<insert misdemeanor not requiring commission in officer's presence>*). However, it is not required that the offense be committed in the officer's presence.]

_____ *<insert crime that was basis for arrest>* is (a/an) (felony/ misdemeanor/infraction).

<Entering home without warrant>

[In order for an officer to enter a home to arrest someone without a warrant [and without consent]:

- 1. The officer must have probable cause to believe that the person to be arrested committed a crime and is in the home;**

AND

- 2. Exigent circumstances require the officer to enter the home without a warrant.**

The term *exigent circumstances* describes an emergency situation that requires swift action to prevent (1) imminent danger to life or serious damage to property, or (2) the imminent escape of a suspect or destruction of evidence.]

[The officer must tell that person that the officer intends to arrest him or her, why the arrest is being made, and the authority for the arrest. [The officer does not have to tell the arrested person these things if the officer has probable cause to believe that the person is committing or attempting to commit a crime, is fleeing immediately after having committed a crime, or has escaped from custody.] [The officer must also tell the arrested person the offense for which he or she is being arrested if he or she asks for that information.]]]

<When giving either paragraph A on unlawful detention or paragraph B on unlawful arrest, give the following paragraph also, if applicable>

[Photographing or recording a *peace officer* while the officer is in a public place or while the person photographing or recording is in a place where he or she has the right to be is not, by itself, a crime nor a

basis for (reasonable suspicion to detain/ [nor] probable cause to arrest).]

<C. Use of Force>

[Special rules control the use of force.

A peace officer may use reasonable force to arrest or detain someone, to prevent escape, to overcome resistance, or in self-defense.

[If a person knows, or reasonably should know, that a peace officer is arresting or detaining him or her, the person must not use force or any weapon to resist an officer's use of reasonable force. [However, you may not find the defendant guilty of resisting arrest if the arrest was unlawful, even if the defendant knew or reasonably should have known that the officer was arresting him.]]

If a peace officer uses unreasonable or excessive force while (arresting or attempting to arrest/ [or] detaining or attempting to detain) a person, that person may lawfully use reasonable force to defend himself or herself.

A person being arrested or detained uses reasonable force when he or she: (1) uses that degree of force that he or she actually believes is reasonably necessary to protect himself or herself from the officer's use of unreasonable or excessive force; and (2) uses no more force than a reasonable person in the same situation would believe is necessary for his or her protection.]

New January 2006; Revised August 2016

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction if there is sufficient evidence that the officer was not lawfully performing his or her duties and lawful performance is an element of the offense. (*People v. Gonzalez* (1990) 51 Cal.3d 1179, 1217 [275 Cal.Rptr. 729, 800 P.2d 1159] ["disputed facts bearing on the issue of legal cause must be submitted to the jury considering an engaged-in-duty element"]; *People v. Olguin* (1981) 119 Cal.App.3d 39, 46–47 [173 Cal.Rptr. 663]; *People v. Castain* (1981) 122 Cal.App.3d 138, 145 [175 Cal.Rptr. 651]; *People v. White* (1980) 101 Cal.App.3d 161, 166–168 [161 Cal.Rptr. 541].)

Give section A if there is an issue as to whether the officer had a legal basis to detain someone. Give section B if there is an issue as to whether the officer had a legal basis to arrest someone. Give section C if there is an issue as to whether the officer used excessive force in arresting or detaining someone. If the issue is whether the officer used excessive force in some other duty, give section C with any necessary modifications.

If this instruction is only relevant to a charge of violating Penal Code section 148, the court **must not give** the bracketed sentence in section C that begins with “If a person knows, or reasonably should know, that a peace officer is arresting or detaining him or her.” (*People v. White, supra*, 101 Cal.App.3d at pp. 168–169 [court must clarify that Penal Code section 834a does not apply to charge under section 148].) If the case does not involve an alleged violation of Penal Code section 148 (either as a charge offense or as a lesser), the court should give that bracketed sentence. If the case involves an alleged violation of Penal Code section 148 as well as other offenses in which lawful performance is an element, the court may give the bracketed sentence but must also give the sentence that begins with “However, you may not find the defendant guilty of resisting arrest.”

When giving the bracketed section under the heading “A. Unlawful Detention,” if there is a factual issue about whether the person was in fact “detained,” the court should provide the jury with a definition of when a person is detained. Similarly, if there is a factual issue as to whether the person consented to the detention, the court should instruct on consent. (See *People v. Wilkins* (1993) 14 Cal.App.4th 761, 777 [17 Cal.Rptr.2d 743].)

In the section headed “B. Unlawful Arrest,” two options are provided for arrests without a warrant. The general rule is that an officer may not make an arrest for a misdemeanor or infraction unless the offense was committed in the officer’s presence. (See Pen. Code, § 836(a)(1).) Statutes provide exceptions to this requirement for some misdemeanors. (See, e.g., Pen. Code, § 836(c) [violation of domestic violence protective or restraining order]; Veh. Code, § 40300.5 [driving under the influence plus traffic accident or other specified circumstance].) If the officer made the arrest for an infraction or a misdemeanor falling under the general rule, give the bracketed paragraph under the heading “Arrest without warrant for most misdemeanors or infraction.” If the officer made the arrest for a felony or misdemeanor not requiring commission in the officer’s presence give the bracketed paragraph under the heading “Arrest without warrant for felony or misdemeanor not requiring commission in officer’s presence.” The court may also give both bracketed paragraphs, if appropriate.

Give the bracketed section about entering a home without a warrant if the arrest took place in a home. (*People v. Wilkins* (1993) 14 Cal.App.4th 761, 777 [17 Cal.Rptr.2d 743].) If there is a factual issue about whether the officer had consent to enter the home, the court must also instruct on the legal requirements for consent. (*Ibid.*)

AUTHORITY

- Instructional Duty. *People v. Gonzalez* (1990) 51 Cal.3d 1179, 1217 [275 Cal.Rptr. 729, 800 P.2d 1159]; *People v. Olguin* (1981) 119 Cal.App.3d 39, 46–47 [173 Cal.Rptr. 663]; *People v. Castain* (1981) 122 Cal.App.3d 138, 145 [175 Cal.Rptr. 651]; *People v. White* (1980) 101 Cal.App.3d 161, 166–168 [161 Cal.Rptr. 541].

- Lawful Detention. *People v. Celis* (2004) 33 Cal.4th 667, 674–675 [16 Cal.Rptr.3d 85, 93 P.3d 1027].
- Lawful Arrest. Pen. Code, §§ 834–836, 841.
- Probable Cause Defined. *People v. Celis* (2004) 33 Cal.4th 667, 673 [16 Cal.Rptr.3d 85, 93 P.3d 1027]; *People v. Fischer* (1957) 49 Cal.2d 442, 446 [317 P.2d 967].
- Officer’s Training and Experience Relevant. *People v. Lilienthal* (1978) 22 Cal.3d 891, 899 [150 Cal.Rptr. 910, 587 P.2d 706]; *People v. Clayton* (1970) 13 Cal.App.3d 335, 338 [91 Cal.Rptr. 494].
- Duty to Submit to Arrest or Detention. Pen. Code, § 834(a); *People v. Allen* (1980) 109 Cal.App.3d 981, 985 [167 Cal.Rptr. 502]; *People v. Curtis* (1969) 70 Cal.2d 347, 351 [74 Cal.Rptr. 713, 450 P.2d 33].
- Exigent Circumstances to Enter Home. *People v. Wilkins* (1993) 14 Cal.App.4th 761, 777 [17 Cal.Rptr.2d 743]; *People v. Ramey* (1976) 16 Cal.3d 263, 276 [127 Cal.Rptr. 629, 545 P.2d 1333]; *People v. Hoxter* (1999) 75 Cal.App.4th 406, 414, fn. 7 [89 Cal.Rptr.2d 259].
- Reasonable Force. Pen. Code, §§ 692, 693.
- Excessive Force Makes Arrest Unlawful. *People v. White* (1980) 101 Cal.App.3d 161, 166–168 [161 Cal.Rptr. 541].
- Excessive Force Triggers Right to Self-Defense With Reasonable Force. *People v. Curtis* (1969) 70 Cal.2d 347, 356 [74 Cal.Rptr. 713, 450 P.2d 33].
- Merely Photographing or Recording Officers Not a Crime. Pen. Code, § 148(g).

Secondary Sources

1 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 11, *Arrest*, §§ 11.01–11.06 (Matthew Bender).

3 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 73, *Defenses and Justifications*, § 73.15[1], [2] (Matthew Bender).

RELATED ISSUES

Service of Warrant

An officer is lawfully engaged in his or her duties if he or she is correctly serving “a facially valid search or arrest warrant, regardless of the legal sufficiency of the facts shown in support of the warrant.” (*People v. Gonzalez* (1990) 51 Cal.3d 1179, 1222 [275 Cal.Rptr. 729, 800 P.2d 1159].) On the other hand, “the proper *service* of a warrant is a jury issue under the engaged-in-duty requirement.” (*Id.* at p. 1223 [emphasis in original].) If there is a factual dispute over the manner in which the

warrant was served, the court should instruct the jury on the requirements for legal service of the warrant. (*Ibid.*)

Lawfulness of Officer's Conduct Based on Objective Standard

The rule “requires that the officer’s lawful conduct be established as an objective fact; it does not establish any requirement with respect to the defendant’s mens rea.” (*People v. Jenkins* (2000) 22 Cal.4th 900, 1020 [95 Cal.Rptr.2d 377, 997 P.2d 1044].) The defendant’s belief about whether the officer was or was not acting lawfully is irrelevant. (*Id* at p. 1021.)

Photographing or Recording Officers

Penal Code section 148(g) provides that merely photographing or recording a public officer or peace officer under certain conditions is not a crime. The intended scope of this new legislation is unclear. Until the legislature or courts of review provide further guidance, the court will have to determine whether section 148(g) should apply in an individual case.

2671. Lawful Performance: Custodial Officer

The People have the burden of proving beyond a reasonable doubt that _____ *<insert name, excluding title>* was lawfully performing (his/her) duties as a custodial officer. If the People have not met this burden, you must find the defendant not guilty of _____ *<insert name[s] of all offense[s] with lawful performance as an element>*.

A custodial officer is not lawfully performing his or her duties if he or she is using unreasonable or excessive force in his or her duties.

Special rules control the use of force.

A custodial officer may use reasonable force in his or her duties to restrain a person, to overcome resistance, to prevent escape, or in self-defense.

If a person knows, or reasonably should know, that a custodial officer is restraining him or her, that person must not use force or any weapon to resist an officer's use of reasonable force.

If a custodial officer uses unreasonable or excessive force while (restraining a person/ [or] overcoming a person's resistance/ [or] preventing a person from escaping/ [or] defending himself or herself from a person), that person may lawfully use reasonable force to defend himself or herself.

A person uses reasonable force when he or she: (1) uses that degree of force that he or she actually believes is reasonably necessary to protect himself or herself from the officer's use of unreasonable or excessive force; and (2) uses no more force than a reasonable person in the same situation would believe is necessary for his or her protection.

New January 2006; Revised April 2010

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction if there is sufficient evidence that the officer was not lawfully performing his or her duties and lawful performance is an element of the offense. (*People v. Gonzalez* (1990) 51 Cal.3d 1179, 1217 [275 Cal.Rptr. 729, 800 P.2d 1159] ["disputed facts bearing on the issue of legal cause must be submitted to the jury considering an engaged-in-duty element"]; *People v. Olguin* (1981) 119 Cal.App.3d 39, 46–47 [173 Cal.Rptr. 663]; *People v. Castain* (1981) 122 Cal.App.3d 138, 145 [175 Cal.Rptr. 651]; *People v. White* (1980) 101 Cal.App.3d 161, 166–168 [161 Cal.Rptr. 541].)

AUTHORITY

- Instructional Duty. *People v. Gonzalez* (1990) 51 Cal.3d 1179, 1217 [275

Cal.Rptr. 729, 800 P.2d 1159]; *People v. Olguin* (1981) 119 Cal.App.3d 39, 46–47 [173 Cal.Rptr. 663]; *People v. Castain* (1981) 122 Cal.App.3d 138, 145 [175 Cal.Rptr. 651]; *People v. White* (1980) 101 Cal.App.3d 161, 166–168 [161 Cal.Rptr. 541].

- Reasonable Force. Pen. Code, §§ 692, 693.
- Excessive Force Triggers Right to Self-Defense With Reasonable Force. *People v. Curtis* (1969) 70 Cal.2d 347, 356 [74 Cal.Rptr. 713, 450 P.2d 33].
- Circumstances Under Which Defendant May Resort to Self-Defense. *People v. Gutierrez* (2009) 174 Cal.App.4th 515, 522–524 [94 Cal.Rptr.3d 228].

Secondary Sources

3 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 73, *Defenses and Justifications*, §§ 73.11–73.14 (Matthew Bender).

RELATED ISSUES

Lawfulness of Officer’s Conduct Based on Objective Standard

The rule “requires that the officer’s lawful conduct be established as an objective fact; it does not establish any requirement with respect to the defendant’s mens rea.” (*People v. Jenkins* (2000) 22 Cal.4th 900, 1020 [95 Cal.Rptr.2d 377, 997 P.2d 1044].) The defendant’s belief about whether the officer was or was not acting lawfully is irrelevant. (*Id.* at p. 1021.)

2672. Lawful Performance: Resisting Unlawful Arrest With Force

The defendant is not guilty of the crime of (battery against a peace officer[,]/ [or] assault against a peace officer[,]/ [or] assault with (force likely to produce great bodily injury/a deadly weapon/a firearm/a semiautomatic firearm/a machine gun/an assault weapon) against a peace officer[,]/ [or] _____ <insert other crime charged, e.g., resisting arrest>) if the officer was not lawfully performing (his/her) duties because (he/she) was unlawfully arresting someone.

However, even if the arrest was unlawful, as long as the officer used only reasonable force to accomplish the arrest, the defendant may be guilty of the lesser crime of (battery[,]/ [or] assault[,]/ [or] assault with (force likely to produce great bodily injury/a deadly weapon/a firearm/a semiautomatic firearm/a machine gun/an assault weapon)).

On the other hand, if the officer used unreasonable or excessive force, and the defendant used only reasonable force in (self-defense/ [or] defense of another), then the defendant is not guilty of the lesser crime[s] of (battery[,]/ [or] assault[,]/ [or] assault with (force likely to produce great bodily injury/a deadly weapon/a firearm/a semiautomatic firearm/a machine gun/an assault weapon)).

The People have the burden of proving beyond a reasonable doubt that the officer was lawfully performing (his/her) duties. If the People have not met this burden, you must find the defendant not guilty [of _____ <insert crimes>].

New January 2006

BENCH NOTES

Instructional Duty

The court may give this instruction on request.

AUTHORITY

- No Right to Forcibly Resist Arrest. Pen. Code, § 834a.
- Applies to Arrest, Not Detention. *People v. Coffey* (1967) 67 Cal.2d 204, 221 [60 Cal.Rptr. 457, 430 P.2d 15]; *People v. Jones* (1970) 8 Cal.App.3d 710, 717 [87 Cal.Rptr. 625].
- Forcible Resistance to Unlawful Arrest Is Battery or Assault on Nonofficer. *People v. Curtis* (1969) 70 Cal.2d 347, 355–356 [74 Cal.Rptr. 713, 450 P.2d 33]; *People v. White* (1980) 101 Cal.App.3d 161, 166 [161 Cal.Rptr. 541].

- Use of Reasonable Force in Response to Excessive Force Is Complete Defense. *People v. White* (1980) 101 Cal.App.3d 161, 168 [161 Cal.Rptr. 541].
- May Not Be Convicted of Resisting Unlawful Arrest. *People v. White* (1980) 101 Cal.App.3d 161, 166 [161 Cal.Rptr. 541]; *People v. Moreno* (1973) 32 Cal.App.3d Supp. 1, 10 [108 Cal.Rptr. 338].

Secondary Sources

3 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 73, *Defenses and Justifications*, §§ 73.11[2][b], 73.15[2] (Matthew Bender).

2673. Pat-Down Search

An officer who has lawfully detained someone may conduct a carefully limited search of the detained person's outer clothing, in order to discover whether that person has a weapon. The officer may conduct this limited search only if he or she reasonably believes that the detained person may be armed and dangerous.

[If, during the search, the officer finds an object that feels reasonably like (a/an) (knife[,]/ [or] gun[,]/ [or] club[,]/ [or] _____ <insert specific type of weapon>), the officer may remove the object from the person's clothing.]

New January 2006

BENCH NOTES

Instructional Duty

The court may give this instruction on request.

AUTHORITY

- Stop and Frisk Permissible. *Terry v. Ohio* (1968) 392 U.S. 1, 30–31 [88 S.Ct. 1868, 20 L.Ed.2d 889]; *People v. Scott* (1976) 16 Cal.3d 242, 248 [128 Cal.Rptr. 39, 546 P.2d 327].
- Officer May Remove Object That Feels Like Typical Weapon. *People v. Collins* (1970) 1 Cal.3d 658, 663 [83 Cal.Rptr. 179, 463 P.2d 403]; *People v. Watson* (1970) 12 Cal.App.3d 130, 135 [90 Cal.Rptr. 483].

Secondary Sources

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Illegally Obtained Evidence, § 249 et seq.

1 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 10, *Investigative Detention*, §§ 10.01–10.06 (Matthew Bender).

2674–2679. Reserved for Future Use

G. UNLAWFUL ASSEMBLY AND DISTURBING THE PEACE

2680. Courthouse Picketing (Pen. Code, § 169)

The defendant is charged [in Count _____] with (picketing/ [or] parading) near a courthouse [in violation of Penal Code section 169].

To prove that the defendant is guilty of this crime, the People must prove that:

1. The defendant (picketed/ [or] paraded) in or near a state court building;

AND

2. When the defendant acted, (he/she) did so with the intent (to interfere with, obstruct, or impede the administration of justice/ [or] to influence (a/an) (judge[,]/ [or] juror[,]/ [or] witness[,]/ [or] officer of the court) in the discharge of his or her duty).

New January 2006

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

AUTHORITY

- Elements. Pen. Code, § 169.
- Similar Statute Constitutional. *Cox v. Louisiana* (1964) 379 U.S. 559, 564 [85 S.Ct. 476, 13 L.Ed.2d 487] [upholding Louisiana statute nearly identical to Pen. Code, § 169].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Governmental Authority, § 31.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 144, *Crimes Against Order*, § 144.21 (Matthew Bender).

2681. Disturbance of Public Meeting (Pen. Code, § 403)

The defendant is charged [in Count _____] with (disturbing/ [or] breaking up) a public meeting [in violation of Penal Code section 403].

To prove that the defendant is guilty of this crime, the People must prove that:

1. The defendant intentionally committed acts that violated (implicit customs or usages of/ [or] explicit rules for governing) a public meeting;
2. The defendant knew or reasonably should have known that (his/her) acts violated those (customs[,]/ [or] usages[,]/ [or] rules);

AND

3. The defendant's acts substantially [and unlawfully] interfered with the conduct of the meeting.

You may not find the defendant guilty of this crime unless you find that the defendant's acts themselves, not the message or expressive content of the acts, substantially interfered with the conduct of the meeting.

[When deciding whether the defendant knew or reasonably should have known that (his/her) acts violated the (implicit customs or usages of/ [or] explicit rules for governing) the meeting, you may consider whether someone warned or requested the defendant to stop (his/her) activities.]

New January 2006; Revised February 2012

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

On request, give the bracketed sentence that begins with "When deciding whether," if the meeting did not have explicit rules of governance. (*In re Kay* (1970) 1 Cal.3d 930, 945 [83 Cal.Rptr. 686, 464 P.2d 142].)

Do not give this instruction if the disturbance occurs at a religious meeting covered by Pen. Code, § 302 or at a meeting where "electors" are "assembling" pursuant to Elec. Code, § 18340. The court will need to draft separate instructions for those offenses.

AUTHORITY

- Elements. Pen. Code, § 403; *In re Kay* (1970) 1 Cal.3d 930, 941–943 [83 Cal.Rptr. 686, 464 P.2d 142].

- First Amendment Limitations on Statute. *In re Kay* (1970) 1 Cal.3d 930, 941–942 [83 Cal.Rptr. 686, 464 P.2d 142].
- Must Be Public Meeting. *Farraher v. Superior Court* (1919) 45 Cal.App. 4, 6 [187 P. 72].
- No Clear and Present Danger Requirement. *McMahon v. Albany Unified School Dist.* (2002) 104 Cal.App.4th 1275, 1287–1288 [129 Cal.Rptr.2d 184].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, § 16.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 144, *Crimes Against Order*, § 144.21 (Matthew Bender).

2682. Inciting a Riot (Pen. Code, § 404.6(a))

The defendant is charged [in Count _____] with inciting a riot [in violation of Penal Code section 404.6(a)].

To prove that the defendant is guilty of this crime, the People must prove that:

1. The defendant (did an act or engaged in conduct that encouraged a riot[,]/ [or] urged others to commit acts of force or violence[,]/ [or] urged others to burn or destroy property);
2. The defendant acted at a time and place and under circumstances that produced a clear, present, and immediate danger that (a riot would occur/ [or] acts of force or violence would happen/ [or] property would be burned or destroyed);

AND

3. When the defendant acted, (he/she) intended to cause a riot.

A *riot* occurs when two or more people, acting together and without legal authority, disturb the public peace by using force or violence or by threatening to use force or violence with the immediate ability to carry out those threats.

[The People do not have to prove that anyone actually (rioted/ [or] committed acts of force or violence/ [or] burned or destroyed property).]

New January 2006

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

Give the bracketed sentence that begins with “The People do not have to prove” on request.

AUTHORITY

- Elements. Pen. Code, § 404.6(a).
- Riot Defined. Pen. Code, § 404.
- Statute Constitutional. *People v. Davis* (1968) 68 Cal.2d 481, 484–487 [67 Cal.Rptr. 547, 439 P.2d 651].
- Terms of Statute Understandable. *People v. Jones* (1971) 19 Cal.App.3d 437, 447 [96 Cal.Rptr. 795].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, § 14.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 144, *Crimes Against Order*, § 144.21 (Matthew Bender).

RELATED ISSUES***Defendant Must Urge Others***

To be guilty of inciting a riot, the defendant must urge others to commit acts of force or property destruction. (*People v. Boyd* (1985) 38 Cal.3d 762, 778 [215 Cal.Rptr. 1, 700 P.2d 782]; *In re Wagner* (1981) 119 Cal.App.3d 90, 106 [173 Cal.Rptr. 766].) Thus, in *In re Wagner, supra*, 119 Cal.App.3d at p. 106, the court held that the evidence was insufficient to establish incitement to riot where the defendant was observed throwing rocks at the police.

2683. Participating in a Riot (Pen. Code, §§ 404, 405)

The defendant is charged [in Count _____] with participating in a riot [in violation of Penal Code section 405].

To prove that the defendant is guilty of this crime, the People must prove that the defendant willfully participated in a riot.

A *riot* occurs when two or more people, acting together and without legal authority, disturb the public peace by using force or violence or by threatening to use force or violence with the immediate ability to carry out those threats.

Someone commits an act *willfully* when he or she does it willingly or on purpose.

New January 2006

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

AUTHORITY

- Elements. Pen. Code, §§ 404, 405.
- Riot Defined. Pen. Code, § 404.
- Willfully Defined. Pen. Code, § 7(1); *People v. Lara* (1996) 44 Cal.App.4th 102, 107 [51 Cal.Rptr.2d 402].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, § 13.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 144, *Crimes Against Order*, § 144.21 (Matthew Bender).

RELATED ISSUES

Prior Agreement Not Necessary

“It [is] not necessary that a previous agreement between the aggressors should have been alleged, or have existed, to bring such offenses within the inhibitions of section 404.” (*People v. Bundte* (1948) 87 Cal.App.2d 735, 743 [197 P.2d 823].)

“Thus, it is the *concurrence* of unlawful action by individuals in the use, or threat to unlawfully use force or violence that constitutes the offense of riot. [Citation.]

All persons who encourage, incite, promote, give support to or countenance a riot are principals in a riot.” (*People v. Cipriani* (1971) 18 Cal.App.3d 299, 304 [95

Cal.Rptr. 722] [italics in original, citing *People v. Bundte*, *supra*, 87 Cal.App.2d at pp. 744–746].)

Mere Presence Not Sufficient

Mere presence alone does not make someone a rioter. (*People v. Bundte* (1948) 87 Cal.App.2d 735, 746 [197 P.2d 823].)

2684. Participating in a Rout (Pen. Code, §§ 406, 408)

The defendant is charged [in Count _____] with participating in a rout [in violation of Penal Code section 408].

To prove that the defendant is guilty of this crime, the People must prove that the defendant willfully participated in a rout.

A *rout* occurs when two or more people, assembled and acting together, make an attempt to commit or advance toward committing an act that would be a riot if actually committed.

A *riot* occurs when two or more people, acting together and without legal authority, disturb the public peace by using force or violence or by threatening to use force or violence with the immediate ability to carry out those threats.

Someone commits an act *willfully* when he or she does it willingly or on purpose.

New January 2006

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

AUTHORITY

- Elements. Pen. Code, §§ 406, 408; *In re Wagner* (1981) 119 Cal.App.3d 90, 106 [173 Cal.Rptr. 766].
- Rout Defined. Pen. Code, § 406.
- Riot Defined. Pen. Code, § 404.
- Willfully Defined. Pen. Code, § 7(1); *People v. Lara* (1996) 44 Cal.App.4th 102, 107 [51 Cal.Rptr.2d 402].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, § 10.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 144, *Crimes Against Order*, § 144.21 (Matthew Bender).

2685. Participating in an Unlawful Assembly (Pen. Code, §§ 407, 408)

The defendant is charged [in Count _____] with participating in an unlawful assembly [in violation of Penal Code section 408].

To prove that the defendant is guilty of this crime, the People must prove that:

1. The defendant willfully participated in an unlawful assembly;
- AND
2. The defendant knew that the assembly was unlawful when (he/ she) participated.

Someone commits an act *willfully* when he or she does it willingly or on purpose.

An *unlawful* assembly occurs when two or more people assemble together (to commit a crime/ [or] to do a lawful act in a violent manner).

[When two or more people assemble to do a lawful act in a violent manner, the assembly is not *unlawful* unless violence actually occurs or there is a clear and present danger that violence will occur immediately.]

New January 2006

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

Penal Code section 407 defines an “unlawful assembly” as two or more people assembled together “to do an unlawful act, or do a lawful act in a violent, boisterous, or tumultuous manner.” The Supreme Court has held that “the proscriptions of sections 407 and 408 on assemblies to do a lawful act must be limited to assemblies which are violent or which pose a clear and present danger of imminent violence.” (*In re Brown* (1973) 9 Cal.3d 612, 623 [108 Cal.Rptr. 465, 510 P.2d 1017]; see *Collins v. Jordan* (9th Cir. 1996) 110 F.3d 1363, 1371.) Because the assembly must in fact be violent or pose an immediate threat of violence, an assembly that is “boisterous or tumultuous” does not establish a violation of the statute. The committee has therefore eliminated these words from the instruction since they are archaic and potentially confusing.

AUTHORITY

- Elements. Pen. Code, §§ 407, 408.

- Unlawful Assembly Defined. Pen. Code, § 407.
- Assembly for Lawful Act Requires Violence or Clear and Present Danger of Violence. *In re Brown* (1973) 9 Cal.3d 612, 623 [108 Cal.Rptr. 465, 510 P.2d 1017]; see *Collins v. Jordan* (9th Cir. 1996) 110 F.3d 1363, 1371.
- Specific Intent to Commit Unlawful or Violent Act Not Required. *People v. Kerrick* (1927) 86 Cal.App. 542, 551 [261 P. 756].
- Knowledge That Assembly Unlawful Required. *In re Wagner* (1981) 119 Cal.App.3d 90, 103–104 [173 Cal.Rptr. 766]; *Coverstone v. Davies* (1952) 38 Cal.2d 315, 320 [239 P.2d 876].
- Willfully Defined. Pen. Code, § 7(1); *People v. Lara* (1996) 44 Cal.App.4th 102, 107 [51 Cal.Rptr.2d 402].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, § 11.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 144, *Crimes Against Order*, § 144.21 (Matthew Bender).

**2686. Refusal to Disperse: Riot, Rout, or Unlawful Assembly
(Pen. Code, §§ 407, 409)**

The defendant is charged [in Count _____] with refusal to disperse after being ordered to do so [in violation of Penal Code section 409].

To prove that the defendant is guilty of this crime, the People must prove that:

1. The defendant was present at the location of (a/an) (riot[,]/ [or] rout[,]/ [or] unlawful assembly);
 2. A public officer lawfully ordered the defendant to disperse;
- [AND]
3. The defendant willfully remained present at the location of the (riot[,]/ [or] rout[,]/ [or] unlawful assembly) after the order to disperse(;/.)

<Give element 4 when instructing on the defense of being a public officer or person assisting an officer.>

[AND]

4. The defendant was not a public officer or a person assisting an officer in attempting to disperse the (riot[,]/ [or] rout[,]/ [or] unlawful assembly).]

Someone commits an act *willfully* when he or she does it willingly or on purpose.

[A *riot* occurs when two or more people, acting together and without legal authority, disturb the public peace by using force or violence or by threatening to use force or violence with the immediate ability to carry out those threats.]

[A *rout* occurs when two or more people, assembled and acting together, make an attempt to commit or advance toward committing an act that would be a riot if actually committed.]

[An *unlawful* assembly occurs when two or more people assemble together (to commit a crime/ [or] to do a lawful act in a violent manner).

[When two or more people assemble to do a lawful act in a violent manner, the assembly is not *unlawful* unless violence actually occurs or there is a clear and present danger that violence will occur immediately.]]

(A/An) _____ *<insert description>* is a *public officer*.

A public officer *lawfully warns people to disperse* when the officer directs them, in the name of the People of the State, to immediately disperse. The officer is not required to use any particular words. However, the words used must be sufficient to inform a reasonable person that the officer is acting in an official capacity and ordering people to leave the area. In addition, the officer must communicate the order in a reasonable way that ensures that the order is heard.

[The People do not have to prove that the defendant participated in the (riot[,]/ [or] rout[,]/ [or] unlawful assembly).]

New January 2006

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

Give element 4 if there is evidence that the defendant was a public officer or assisting a public officer.

Penal Code section 407 defines an “unlawful assembly” as two or more people assembled together “to do an unlawful act, or do a lawful act in a violent, boisterous, or tumultuous manner.” The Supreme Court has held that “the proscriptions of sections 407 and 408 on assemblies to do a lawful act must be limited to assemblies which are violent or which pose a clear and present danger of imminent violence.” (*In re Brown* (1973) 9 Cal.3d 612, 623 [108 Cal.Rptr. 465, 510 P.2d 1017]; see *Collins v. Jordan* (9th Cir. 1996) 110 F.3d 1363, 1371.) Because the assembly must in fact be violent or pose an immediate threat of violence, an assembly that is “boisterous or tumultuous” does not establish a violation of the statute. The committee has therefore eliminated these words from the instruction since they are archaic and potentially confusing.

The jury must determine whether the person who allegedly gave the order was a public officer. (See *People v. Brown* (1988) 46 Cal.3d 432, 444–445 [250 Cal.Rptr. 604, 758 P.2d 1135].) The court may instruct the jury on the appropriate definition of “public officer” (e.g., in the case of “peace officer,” the court may state “a Garden Grove Regular Police Officer and a Garden Grove Reserve Police Officer are peace officers”). (*Ibid.*) However, the court may not instruct the jury that the person was a public officer as a matter of law (e.g., “Officer Reed was a peace officer”). (*Ibid.*)

Give the bracketed sentence that begins with “The People do not have to prove” on request. (*In re Bacon* (1966) 240 Cal.App.2d 34, 49 [49 Cal.Rptr. 322].)

AUTHORITY

- Elements. Pen. Code, §§ 407, 409.

- Command to Disperse. Pen. Code, § 726.
- Riot Defined. Pen. Code, § 404.
- Rout Defined. Pen. Code, § 406.
- Unlawful Assembly Defined. Pen. Code, § 407.
- Assembly for Lawful Act Requires Violence or Clear and Present Danger of Violence. *In re Brown* (1973) 9 Cal.3d 612, 623 [108 Cal.Rptr. 465, 510 P.2d 1017]; see *Collins v. Jordan* (9th Cir. 1996) 110 F.3d 1363, 1371.
- No Particular Manner of Warning Required. *In re Bacon* (1966) 240 Cal.App.2d 34, 50–51 [49 Cal.Rptr. 322]; *People v. Cipriani* (1971) 18 Cal.App.3d 299, 307–308 [95 Cal.Rptr. 722]; *In re Wagner* (1981) 119 Cal.App.3d 90, 105 [173 Cal.Rptr. 766].
- Willfully Defined. Pen. Code, § 7(1); *People v. Lara* (1996) 44 Cal.App.4th 102, 107 [51 Cal.Rptr.2d 402].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, § 15.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 144, *Crimes Against Order*, § 144.21 (Matthew Bender).

RELATED ISSUES

Penal Code Sections 409 and 416(a)

Penal Code section 409 applies to any person remaining at an unlawful assembly following an order to disperse, whether or not that person is involved in the violent or illegal activity. (*Dubner v. City and Co. of San Francisco* (2001) 266 F.3d 959, 967–968; *In re Bacon* (1966) 240 Cal.App.2d 34, 49 [49 Cal.Rptr. 322].) Refusal to disperse is also punishable under Penal Code section 416(a). Penal Code section 416(a) applies only to those who have the specific intent to commit violent or unlawful acts but does not require that the gathering meet the definition of riot, rout, or unlawful assembly. (*Dubner v. City and Co. of San Francisco* (9th Cir. 2001) 266 F.3d 959, 967–968; *In re Wagner* (1981) 119 Cal.App.3d 90, 110–111 [173 Cal.Rptr. 766].) Use this instruction only for a charge of violating Penal Code section 409. If the defendant is charged under Penal Code section 416(a), give CALCRIM No. 2687, *Refusal to Disperse: Intent to Commit Unlawful Act*.

**2687. Refusal to Disperse: Intent to Commit Unlawful Act (Pen.
Code, § 416(a))**

The defendant is charged [in Count _____] with refusal to disperse after being ordered to do so [in violation of Penal Code section 416(a)].

To prove that the defendant is guilty of this crime, the People must prove that:

1. The defendant assembled with one or more other people;
2. The defendant intended to (disturb the public peace/ [or] commit a crime);
3. A public officer had probable cause to believe that the purpose of the assembly was unlawful;
4. The public officer lawfully warned the defendant to disperse;

AND

5. The defendant willfully remained present at the location after the order to disperse.

[As used here, a person *intends to disturb the public peace* if he or she intends to commit overt acts that are themselves violent or that tend to incite others to violence.]

Someone commits an act *willfully* when he or she does it willingly or on purpose.

(A/An) _____ <insert description> is a *public officer*.

A public officer *lawfully warns people to disperse* when the officer directs them, in the name of the People of the State, to immediately disperse. The officer is not required to use any particular words. However, the words used must be sufficient to inform a reasonable person that the officer is acting in an official capacity and ordering people to leave the area. In addition, the officer must communicate the order in a reasonable way that ensures that the order is heard.

An officer has *probable cause* to believe that the purpose of the assembly is unlawful if the officer knows facts that would persuade someone of reasonable caution to believe that the people present intend to (immediately commit criminal or violent acts/ [or] incite others to immediately commit acts of violence).

In deciding whether the officer has probable cause, consider evidence of the officer's training and experience and all the circumstances the officer knew about at the time.

New January 2006

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

The jury must determine whether the person who allegedly gave the order was a public officer. (See *People v. Brown* (1988) 46 Cal.3d 432, 444–445 [250 Cal.Rptr. 604, 758 P.2d 1135].) The court may instruct the jury on the appropriate definition of “public officer” (e.g., in the case of “peace officer,” the court may state “a Garden Grove Regular Police Officer and a Garden Grove Reserve Police Officer are peace officers”). (*Ibid.*) However, the court may not instruct the jury that the person was a public officer as a matter of law (e.g., “Officer Reed was a peace officer”). (*Ibid.*)

AUTHORITY

- Elements. Pen. Code, § 416(a).
- First Amendment Limitations on Statute. *Chambers v. Municipal Court* (1977) 65 Cal.App.3d 904, 909–911 [135 Cal.Rptr. 695].
- Command to Disperse. Pen. Code, § 726.
- No Particular Manner of Warning Required. *In re Bacon* (1966) 240 Cal.App.2d 34, 50–51 [49 Cal.Rptr. 322]; *People v. Cipriani* (1971) 18 Cal.App.3d 299, 307–308 [95 Cal.Rptr. 722]; *In re Wagner* (1981) 119 Cal.App.3d 90, 105 [173 Cal.Rptr. 766].
- Willfully Defined. Pen. Code, § 7(1); *People v. Lara* (1996) 44 Cal.App.4th 102, 107 [51 Cal.Rptr.2d 402].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, § 15.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 144, *Crimes Against Order*, §§ 144.21, 144.22 (Matthew Bender).

RELATED ISSUES

Penal Code Sections 409 and 416(a)

Penal Code section 409 applies to any person remaining at an unlawful assembly following an order to disperse, whether or not that person is involved in the violent or illegal activity. (*Dubner v. City and Co. of San Francisco* (9th Cir. 2001) 266 F.3d 959, 967–968; *In re Bacon* (1966) 240 Cal.App.2d 34, 49 [49 Cal.Rptr. 322].) Refusal to disperse is also punishable under Penal Code section 416(a). Penal Code section 416(a) applies only to those who have the specific intent to commit violent or unlawful acts but does not require that the gathering meet the definition of riot, rout, or unlawful assembly. (*Dubner v. City and Co. of San Francisco* (9th Cir. 2001) 266 F.3d 959, 967–968; *In re Wagner* (1981) 119 Cal.App.3d 90, 110–111

CALCRIM No. 2687

CRIMES AGAINST GOVERNMENT

[173 Cal.Rptr. 766].) Use this instruction only for a charge of violating Penal Code section 416(a). If the defendant is charged under Penal Code section 409, give CALCRIM No. 2686, *Refusal to Disperse: Riot, Rout, or Unlawful Assembly*.

2688. Disturbing the Peace: Fighting or Challenging Someone to Fight (Pen. Code, §§ 415(1), 415.5(a)(1))

The defendant is charged [in Count _____] with disturbing the peace [in violation of _____ *<insert appropriate code section[s]>*].

To prove that the defendant is guilty of this crime, the People must prove that:

1. The defendant willfully [and unlawfully] (fought/ [or] challenged someone else to fight);

[AND]

2. The defendant and the other person were (in a public place/in a building or on the grounds of _____ *<insert description of school from Pen. Code, § 415.5>*) when (the fight occurred/ [or] the challenge was made)(;/.)

<Give element 3 when instructing on self-defense or defense of another.>

[AND]

- [3. The defendant did not act (in self-defense/ [or] in defense of someone else)(;/.)]

<Give element 4 when instructing on Pen. Code, § 415.5(f).>

[AND]

- (3/4). The defendant was not (a registered student at the school/ [or] a person engaged in lawful employee-related activity).]

Someone commits an act *willfully* when he or she does it willingly or on purpose.

New January 2006

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime. Give this instruction if the defendant is charged with violating Penal Code section 415(1) or section 415.5(a)(1).

If there is sufficient evidence of self-defense or defense of another, the court has a **sua sponte** duty to instruct on that defense. Give bracketed element 3, the phrase “and unlawfully” in element 1, and any appropriate defense instructions. (See CALCRIM Nos. 3470–3477.)

If the defendant is charged under Penal Code section 415.5(a)(1), select “within a

building or on the grounds of” in element 2 and insert the type of school from the statute. If there is sufficient evidence that the exemption in Penal Code section 415.5(f) applies, the court has a **sua sponte** duty to give bracketed element 4.

If the defendant is charged under Penal Code section 415(1), select “in a public place” in element 2. Do not give bracketed element 4.

AUTHORITY

- Elements. Pen. Code, §§ 415(1), 415.5(a)(1).
- Willfully Defined. Pen. Code, § 7(1); *People v. Lara* (1996) 44 Cal.App.4th 102, 107 [51 Cal.Rptr.2d 402].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, §§ 2–4, 35.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 144, *Crimes Against Order*, § 144.22 (Matthew Bender).

2689. Disturbing the Peace: Loud and Unreasonable Noise (Pen. Code, §§ 415(2), 415.5(a)(2))

The defendant is charged [in Count _____] with disturbing the peace [in violation of _____ <insert appropriate code section[s]>].

To prove that the defendant is guilty of this crime, the People must prove that:

[1.] The defendant maliciously and willfully disturbed another person by causing loud and unreasonable noise(;/.)

<Give element 2 when instructing on Pen. Code, § 415.5(a)(2).>

[AND]

[2. The other person was in a building or on the grounds of _____ <insert description of school from Pen. Code, § 415.5> at the time of the disturbance(;/.)]

<Give element 3 when instructing on Pen. Code, § 415.5(f).>

[AND]

(2/3). The defendant was not (a registered student of the school/ [or] a person engaged in lawful employee-related activity).]

Someone acts *maliciously* when he or she intentionally does a wrongful act or when he or she acts with the unlawful intent to annoy or injure someone else.

Someone commits an act *willfully* when he or she does it willingly or on purpose.

In order to *disturb another person by causing loud and unreasonable noise*, there must be either:

1. A clear and present danger of immediate violence;

OR

2. The noise must be used for the purpose of disrupting lawful activities, rather than as a means to communicate.

The People do not have to prove that the defendant intended to provoke a violent response.

New January 2006

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime. Give this instruction if the defendant is charged with violating Penal

Code section 415(2) or section 415.5(a)(2).

If the defendant is charged under Penal Code section 415.5(a)(2), give bracketed element 2 and insert the type of school from the statute. If there is sufficient evidence that the exemption in Penal Code section 415.5(f) applies, the court has a **sua sponte** duty to give bracketed element 3.

If the defendant is charged under Penal Code section 415(1), give only element 1. Do not give bracketed elements 2 and 3.

AUTHORITY

- Elements. Pen. Code, §§ 415(2), 415.5(a)(2).
- Willfully Defined. Pen. Code, § 7(1); *People v. Lara* (1996) 44 Cal.App.4th 102, 107 [51 Cal.Rptr.2d 402].
- Maliciously Defined. Pen. Code, § 7(4).
- Loud and Unreasonable Noise Defined. *In re Brown* (1973) 9 Cal.3d 612, 618–621 [108 Cal.Rptr. 465, 510 P.2d 1017].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, §§ 2–4, 35.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 144, *Crimes Against Order*, § 144.22 (Matthew Bender).

**2690. Disturbing the Peace: Offensive Words (Pen. Code,
§§ 415(3), 415.5(a)(3))**

The defendant is charged [in Count _____] with disturbing the peace [in violation of _____ *<insert appropriate code section[s]>*].

To prove that the defendant is guilty of this crime, the People must prove that:

1. The defendant used offensive words that were inherently likely to provoke an immediate violent reaction;

[AND]

2. When the defendant used those words, (he/she) was (in a public place/in a building or on the grounds of _____ *<insert description of school from Pen. Code, § 415.5>*)(;/.)

<Give element 3 when instructing on Pen. Code, § 415.5(f).>

[AND]

3. The defendant was not (a registered student of the school/ [or] a person engaged in lawful employee-related activity).]

A person uses offensive words inherently likely to provoke an immediate violent reaction if:

1. He or she says something that is reasonably likely to provoke someone else to react violently;

AND

2. When he or she makes that statement, there is a clear and present danger that the other person will immediately erupt into violence.

In deciding whether the People have proved both of these factors, consider all the circumstances in which the statement was made and the person to whom the statement was addressed.

The People do not have to prove that the defendant intended to provoke a violent response.

<Defense: Good Faith Belief Language Not Likely to Provoke>

[The defendant is not guilty of this crime if (he/she) reasonably and actually believed that the language (he/she) used was not inherently likely to provoke an immediate violent reaction. The People have the burden of proving beyond a reasonable doubt that the defendant did not reasonably and actually believe this to be true. If the People have not met this burden, you must find the defendant not guilty of this

crime.]

New January 2006

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime. Give this instruction if the defendant is charged with violating Penal Code section 415(3) or section 415.5(a)(3).

If the defendant is charged under Penal Code section 415.5(a)(3), select “within a building or on the grounds of” in element 2 and insert the type of school from the statute. If there is sufficient evidence that the exemption in Penal Code section 415.5(f) applies, the court has a **sua sponte** duty to give bracketed element 3.

If the defendant is charged under Penal Code section 415(3), select “in a public place” in element 2. Do not give bracketed element 3.

Defenses—Instructional Duty

If there is sufficient evidence to support the defense that the defendant reasonably believed that his or her words would not provoke, the court has a **sua sponte** duty to give the instruction on that defense. (See *In re John V.* (1985) 167 Cal.App.3d 761, 770 [213 Cal.Rptr. 503] [recognizing defense].)

AUTHORITY

- Elements. Pen. Code, §§ 415(3), 415.5(a)(3).
- Must Be Clear and Present Danger of Immediate Violence. *Cohen v. California* (1971) 403 U.S. 15, 17 [91 S.Ct. 1780, 29 L.Ed.2d 284]; *In re Brown* (1973) 9 Cal.3d 612, 618 [108 Cal.Rptr. 465, 510 P.2d 1017].
- Statement Must Be Uttered in Provocative Manner. *Jefferson v. Superior Court* (1975) 51 Cal.App.3d 721, 724–725 [124 Cal.Rptr. 507]; *In re John V.* (1985) 167 Cal.App.3d 761, 767–768 [213 Cal.Rptr. 503]; *In re Alejandro G.* (1995) 37 Cal.App.4th 44, 47–50 [43 Cal.Rptr.2d 471].
- Context Must Be Considered. *Jefferson v. Superior Court* (1975) 51 Cal.App.3d 721, 724–725 [124 Cal.Rptr. 507]; *In re John V.* (1985) 167 Cal.App.3d 761, 767–768 [213 Cal.Rptr. 503]; *In re Alejandro G.* (1995) 37 Cal.App.4th 44, 47–50 [43 Cal.Rptr.2d 471].
- Intention to Cause Violence Not Required. *Cantwell v. Connecticut* (1940) 310 U.S. 296, 309 [60 S.Ct. 900, 84 L.Ed. 1213].
- Good Faith Defense. *In re John V.* (1985) 167 Cal.App.3d 761, 770 [213 Cal.Rptr. 503].

Secondary Sources

2 Witkin & Epstein, *California Criminal Law* (3d ed. 2000) Crimes Against Public Peace and Welfare, §§ 2–4, 35.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 144, *Crimes Against Order*, § 144.22 (Matthew Bender).

RELATED ISSUES

Statement Made to Police Officer

“In determining whether section 415 subdivision (3) was violated, courts must consider the totality of the circumstances, including the status of the addressee. That the addressee was a police officer trained and obliged to exercise a higher degree of restraint than the average citizen is merely one factor to be considered along with the other circumstances.” (*In re Alejandro G.* (1995) 37 Cal.App.4th 44, 47–50 [43 Cal.Rptr.2d 471]; see also *People v. Callahan* (1985) 168 Cal.App.3d 631, 635 [214 Cal.Rptr. 294] [evidence showed officer “was neither offended . . . nor provoked”].)

2691–2699. Reserved for Future Use

H. VIOLATION OF COURT ORDER

2700. Violation of Court Order (Pen. Code, § 166(a)(4) & (b)(1))

The defendant is charged [in Count _____] with violating a court order [in violation of Penal Code section 166].

To prove that the defendant is guilty of this crime, the People must prove that:

1. A court [lawfully] issued a written order that the defendant _____ <insert description of order>;
2. The defendant knew about the court order and its contents;
3. The defendant had the ability to follow the court order;

AND

4. The defendant willfully violated the court order.

Someone commits an act *willfully* when he or she does it willingly or on purpose.

[The People must prove that the defendant knew about the court order and that (he/she) had the opportunity to read the order or to otherwise become familiar with what it said. But the People do not have to prove that the defendant actually read the court order.]

New January 2006

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

In order for a defendant to be guilty of violating Penal Code section 166(a)(4), the court order must be “lawfully issued.” (Pen. Code, § 166(a)(4); *People v. Gonzalez* (1996) 12 Cal.4th 804, 816–817 [50 Cal.Rptr.2d 74, 910 P.2d 1366].) The defendant may not be convicted for violating an order that is unconstitutional, and the defendant may bring a collateral attack on the validity of the order as a defense to this charge. (*People v. Gonzalez, supra*, 12 Cal.4th at pp. 816–818; *In re Berry* (1968) 68 Cal.2d 137, 147 [65 Cal.Rptr. 273, 436 P.2d 273].) The defendant may raise this issue on demurrer but is not required to. (*People v. Gonzalez, supra*, 12 Cal.4th at pp. 821, 824; *In re Berry, supra*, 68 Cal.2d at p. 146.) The legal question of whether the order was lawfully issued is the type of question normally resolved by the court. (*People v. Gonzalez, supra*, 12 Cal.4th at pp. 816–820; *In re Berry*,

supra, 68 Cal.2d at p. 147.) If, however, there is a factual issue regarding the lawfulness of the court order and the trial court concludes that the issue must be submitted to the jury, give the bracketed word “lawfully” in element 1. The court must also instruct on the facts that must be proved to establish that the order was lawfully issued.

Penal Code section 166(b)(1) provides for an increased sentence if the defendant was previously convicted of stalking and violated a court order “by willfully contacting a victim by phone or mail, or directly.” If the prosecution alleges this factor, in element 1, the court should state that the court ordered the defendant “not to contact _____ <insert name of victim in stalking case> directly, by phone, or by mail,” or something similar. The jury must also determine if the prior conviction has been proved unless the defendant stipulates to the truth of the prior. (See CALCRIM Nos. 3100–3103 on prior convictions.)

If the prosecution alleges that the defendant violated a protective order in a case involving domestic violence (Pen. Code, §§ 166(c)(1), 273.6), do not use this instruction. Give CALCRIM No. 2701, *Violation of Court Order: Protective Order or Stay Away*.

Give the bracketed paragraph that begins with “The People must prove that the defendant knew” on request. (*People v. Poe* (1965) 236 Cal.App.2d Supp. 928, 938–941 [47 Cal.Rptr. 670]; *People v. Brindley* (1965) 236 Cal.App.2d Supp. 925, 927–928 [47 Cal.Rptr. 668], both decisions *affd. sub nom. People v. Von Blum* (1965) 236 Cal.App.2d Supp. 943 [47 Cal.Rptr. 679].)

AUTHORITY

- Elements. Pen. Code, § 166(a)(4) & (b)(1).
- Willfully Defined. Pen. Code, § 7(1); *People v. Lara* (1996) 44 Cal.App.4th 102, 107 [51 Cal.Rptr.2d 402].
- Order Must Be Lawfully Issued. Pen. Code, § 166(a)(4); *People v. Gonzalez* (1996) 12 Cal.4th 804, 816–817 [50 Cal.Rptr.2d 74, 910 P.2d 1366; *In re Berry* (1968) 68 Cal.2d 137, 147 [65 Cal.Rptr. 273, 436 P.2d 273].
- Knowledge of Order Required. *People v. Saffell* (1946) 74 Cal.App.2d Supp. 967, 979 [168 P.2d 497].
- Proof of Service Not Required. *People v. Saffell* (1946) 74 Cal.App.2d Supp. 967, 979 [168 P.2d 497].
- Must Have Opportunity to Read but Need Not Actually Read Order. *People v. Poe* (1965) 236 Cal.App.2d Supp. 928, 938–941 [47 Cal.Rptr. 670]; *People v. Brindley* (1965) 236 Cal.App.2d Supp. 925, 927–928 [47 Cal.Rptr. 668], both decisions *affd. sub nom. People v. Von Blum* (1965) 236 Cal.App.2d Supp. 943 [47 Cal.Rptr. 679].
- Ability to Comply With Order. *People v. Greenfield* (1982) 134 Cal.App.3d Supp. 1, 4 [184 Cal.Rptr. 604].
- General-Intent Offense. *People v. Greenfield* (1982) 134 Cal.App.3d Supp. 1, 4

[184 Cal.Rptr. 604].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Governmental Authority, § 30.

1 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 1, *The California Defense Advocate*, § 1.30 (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, § 142.13[4]; Ch. 144, *Crimes Against Order*, § 144.10[1] (Matthew Bender).

RELATED ISSUES

Violation of Order to Pay Support—Court May Suspend Proceedings

If the defendant is charged with violating Penal Code section 166(a)(4) based on a failure to pay child, spousal, or family support, the court may suspend criminal proceedings if the defendant acknowledges his or her obligation to pay and posts a bond or other surety. (Pen. Code, § 166.5.)

Person Not Directly Bound by Order

A person who is not directly bound by a court order may nevertheless violate Penal Code section 166(a)(4) if he or she acts in concert with a person who is directly bound by the order. (*People v. Saffell* (1946) 74 Cal.App.2d Supp. 967, 978–979 [168 P.2d 497]; *Berger v. Superior Court* (1917) 175 Cal. 719, 721 [167 P. 143].) “[A] nonparty to an injunction is subject to the contempt power of the court when, with knowledge of the injunction, the nonparty violates its terms *with or for* those who are restrained.” (*People v. Conrad* (1997) 55 Cal.App.4th 896, 903 [64 Cal.Rptr.2d 248] [italics in original].) The mere fact that the nonparty shares the same purpose as the restrained party is not sufficient. (*Ibid.*) “An enjoined party . . . has to be demonstrably implicated in the nonparty’s activity.” (*Ibid.*)

Violating Condition of Probation

A defendant may not be prosecuted under Penal Code section 166(a)(4) for violating a condition of probation. (*People v. Johnson* (1993) 20 Cal.App.4th 106, 109 [24 Cal.Rptr.2d 628].)

**2701. Violation of Court Order: Protective Order or Stay Away
(Pen. Code, §§ 166(c)(1), 273.6)**

The defendant is charged [in Count _____] with violating a court order [in violation of _____ <insert appropriate code section[s]>].

To prove that the defendant is guilty of this crime, the People must prove that:

1. A court [lawfully] issued a written order that the defendant _____ <insert description of content of order>;
2. The court order was a (protective order/stay-away court order/ _____ <insert description of other type of order>), issued under _____ <insert code section under which order made> [in a pending criminal proceeding involving domestic violence/as a condition of probation after a conviction for (domestic violence/elder abuse/dependent adult abuse)].
3. The defendant knew of the court order;
4. The defendant had the ability to follow the court order;

AND

<For violations of Pen. Code, § 166(c)(3), choose “willfully”; for violations of Pen. Code § 273.6(c), choose “intentionally” for the scienter requirement.>

5. The defendant (willfully/intentionally) violated the court order.

Someone commits an act *willfully* when he or she does it willingly or on purpose.

[The People must prove that the defendant knew of the court order and that (he/she) had the opportunity to read the order or to otherwise become familiar with what it said. But the People do not have to prove that the defendant actually read the court order.]

[*Domestic violence* means abuse committed against (an adult/a fully emancipated minor) who is a (spouse[,]/ [or] former spouse[,]/ [or] cohabitant[,]/ [or] former cohabitant[,]/ [or] person with whom the defendant has had a child[,]/ [or] person who dated or is dating the defendant[,]/ [or] person who was or is engaged to the defendant).

Abuse means intentionally or recklessly causing or attempting to cause bodily injury, or placing another person in reasonable fear of imminent serious bodily injury to himself or herself or to someone else.]

[The term *cohabitants* means two unrelated persons living together for a substantial period of time, resulting in some permanency of the

relationship. Factors that may determine whether people are cohabiting include, but are not limited to, (1) sexual relations between the parties while sharing the same residence, (2) sharing of income or expenses, (3) joint use or ownership of property, (4) the parties' holding themselves out as (husband and wife/domestic partners), (5) the continuity of the relationship, and (6) the length of the relationship.]

[(Elder/(D/d)ependent adult) abuse means that under circumstances or conditions likely to produce great bodily harm or death, the defendant:

- 1. Willfully caused or permitted any (elder/dependent adult) to suffer;**

OR

- 2. Inflicted on any (elder/dependent adult) unjustifiable physical pain or mental suffering;**

OR

- 3. Having the care or custody of any (elder/dependent adult), willfully caused or permitted the person or health of the (elder/dependent adult) to be injured;**

OR

- 4. Willfully caused or permitted the (elder/dependent adult) to be placed in a situation in which (his/her) person or health was endangered.**

[An *elder* is someone who is at least 65 years old.]

[A *dependent adult* is someone who is between 18 and 64 years old and has physical or mental limitations that restrict his or her ability to carry out normal activities or to protect his or her rights.] [This definition includes an adult who has physical or developmental disabilities or whose physical or mental abilities have decreased because of age.] [A *dependent adult* is also someone between 18 and 64 years old who is an inpatient in a (health facility/psychiatric health facility/ [or] chemical dependency recovery hospital).]]

New January 2006; Revised June 2007, April 2008, August 2009

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

In order for a defendant to be guilty of violating Penal Code section 166(a)(4), the court order must be “lawfully issued.” (Pen. Code, § 166(a)(4); *People v. Gonzalez*

(1996) 12 Cal.4th 804, 816–817 [50 Cal.Rptr.2d 74, 910 P.2d 1366].) The defendant may not be convicted for violating an order that is unconstitutional, and the defendant may bring a collateral attack on the validity of the order as a defense to this charge. (*People v. Gonzalez, supra*, 12 Cal.4th at pp. 816–818; *In re Berry* (1968) 68 Cal.2d 137, 147 [65 Cal.Rptr. 273, 436 P.2d 273].) The defendant may raise this issue on demurrer but is not required to. (*People v. Gonzalez, supra*, 12 Cal.4th at pp. 821, 824; *In re Berry, supra*, 68 Cal.2d at p. 146.) The legal question of whether the order was lawfully issued is the type of question normally resolved by the court. (*People v. Gonzalez, supra*, 12 Cal.4th at pp. 816–820; *In re Berry, supra*, 68 Cal.2d at p. 147.) If, however, there is a factual issue regarding the lawfulness of the court order and the trial court concludes that the issue must be submitted to the jury, give the bracketed word “lawfully” in element 1. The court must also instruct on the facts that must be proved to establish that the order was lawfully issued.

In element 2, give the bracketed phrase “in a criminal case involving domestic violence” if the defendant is charged with a violation of Penal Code section 166(c)(1). In such cases, also give the bracketed definition of “domestic violence” and the associated terms.

In element 2, if the order was not a “protective order” or “stay away order” but another type of qualifying order listed in Penal Code section 166(c)(3) or 273.6(c), insert a description of the type of order from the statute.

In element 2, in all cases, insert the statutory authority under which the order was issued. (See Pen. Code, §§ 166(c)(1) & (3), 273.6(a) & (c).)

Give the bracketed paragraph that begins with “The People must prove that the defendant knew” on request. (*People v. Poe* (1965) 236 Cal.App.2d Supp. 928, 938–941 [47 Cal.Rptr. 670]; *People v. Brindley* (1965) 236 Cal.App.2d Supp. 925, 927–928 [47 Cal.Rptr. 668], both decisions *affd. sub nom. People v. Von Blum* (1965) 236 Cal.App.2d Supp. 943 [47 Cal.Rptr. 679].)

If the prosecution alleges that physical injury resulted from the defendant’s conduct, in addition to this instruction, give CALCRIM No. 2702, *Violation of Court Order: Protective Order or Stay Away—Physical Injury*. (Pen. Code, §§ 166(c)(2), 273.6(b).)

If the prosecution charges the defendant with a felony based on a prior conviction and a current offense involving an act of violence or credible threat of violence, in addition to this instruction, give CALCRIM No. 2703, *Violation of Court Order: Protective Order or Stay Away—Act of Violence*. (Pen. Code, §§ 166(c)(4), 273.6(d).) The jury also must determine if the prior conviction has been proved unless the defendant stipulates to the truth of the prior. (See CALCRIM Nos. 3100–3103 on prior convictions.)

Related Instruction

CALCRIM No. 831, *Abuse of Elder or Dependent Adult* (Pen. Code, § 368(c)).

AUTHORITY

- Elements. Pen. Code, §§ 166(c)(1), 273.6.
- Willfully Defined. Pen. Code, § 7(1); *People v. Lara* (1996) 44 Cal.App.4th 102, 107 [51 Cal.Rptr.2d 402].
- Order Must Be Lawfully Issued. Pen. Code, § 166(a)(4); *People v. Gonzalez* (1996) 12 Cal.4th 804, 816–817 [50 Cal.Rptr.2d 74, 910 P.2d 1366]; *In re Berry* (1968) 68 Cal.2d 137, 147 [65 Cal.Rptr. 273, 436 P.2d 273].
- Knowledge of Order Required. *People v. Saffell* (1946) 74 Cal.App.2d Supp. 967, 979 [168 P.2d 497].
- Proof of Service Not Required. *People v. Saffell* (1946) 74 Cal.App.2d Supp. 967, 979 [168 P.2d 497].
- Must Have Opportunity to Read but Need Not Actually Read Order. *People v. Poe* (1965) 236 Cal.App.2d Supp. 928, 938–941 [47 Cal.Rptr. 670]; *People v. Brindley* (1965) 236 Cal.App.2d Supp. 925, 927–928 [47 Cal.Rptr. 668], both decisions *affd. sub nom. People v. Von Blum* (1965) 236 Cal.App.2d Supp. 943 [47 Cal.Rptr. 679].
- Ability to Comply With Order. *People v. Greenfield* (1982) 134 Cal.App.3d Supp. 1, 4 [184 Cal.Rptr. 604].
- General-Intent Offense. *People v. Greenfield* (1982) 134 Cal.App.3d Supp. 1, 4 [184 Cal.Rptr. 604].
- Abuse Defined. Pen. Code, § 13700(a).
- Cohabitant Defined. Pen. Code, § 13700(b).
- Domestic Violence Defined. Evid. Code, § 1109(d)(3); Pen. Code, § 13700(b); see *People v. Poplar* (1999) 70 Cal.App.4th 1129, 1139 [83 Cal.Rptr.2d 320] [spousal rape is higher level of domestic violence].
- Abuse of Elder or Dependent Adult Defined. Pen. Code, § 368.

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Governmental Authority, § 30.

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against the Person, § 63.

1 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 11, *Arrest*, § 11.02[1] (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, § 142.13[4] (Matthew Bender).

COMMENTARY

Penal Code section 166(c)(1) also includes protective orders and stay aways “issued as a condition of probation after a conviction in a criminal proceeding involving domestic violence” However, in *People v. Johnson* (1993) 20 Cal.App.4th

106, 109 [24 Cal.Rptr.2d 628], the court held that a defendant cannot be prosecuted for contempt of court under Penal Code section 166 for violating a condition of probation. Thus, the committee has not included this option in the instruction.

LESSER INCLUDED OFFENSES

If the defendant is charged with a felony based on a prior conviction and the allegation that the current offense involved an act of violence or credible threat of violence (Pen. Code, §§ 166(c)(4), 273.6(d)), then the misdemeanor offense is a lesser included offense. The court must provide the jury with a verdict form on which the jury will indicate if the additional allegations have or have not been proved. If the jury finds that the either allegation was not proved, then the offense should be set at a misdemeanor.

RELATED ISSUES

See the Related Issues section of CALCRIM No. 2700, *Violation of Court Order*.

2702. Violation of Court Order: Protective Order or Stay Away—Physical Injury (Pen. Code, §§ 166(c)(2), 273.6(b))

If you find the defendant guilty of violating a court order, you must then decide whether the People have proved that the defendant's conduct resulted in physical injury to another person.

The People have the burden of proving this allegation beyond a reasonable doubt. If the People have not met this burden, you must find that this allegation has not been proved.

New January 2006

BENCH NOTES

Instructional Duty

If the prosecution alleges that the defendant's violation of the court order resulted in physical injury, the court has a **sua sponte** duty to instruct on this sentencing factor.

This instruction **must** be given with CALCRIM No. 2701, *Violation of Court Order: Protective Order or Stay Away*.

The court must provide the jury with a verdict form on which the jury will indicate if the prosecution has or has not been proved the allegation.

AUTHORITY

- Enhancements. Pen. Code, §§ 166(c)(2), 273.6(b).

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Governmental Authority, § 30.

1 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 11, *Arrest*, § 11.02[1] (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, § 142.13[4] (Matthew Bender).

2703. Violation of Court Order: Protective Order or Stay Away—Act of Violence (Pen. Code, §§ 166(c)(4), 273.6(d))

If you find the defendant guilty of violating a court order, you must then decide whether the People have proved that the defendant's conduct involved an act of violence [or a credible threat of violence].

[A person makes a *credible threat of violence* when he or she willfully and maliciously communicates a threat to a victim of or a witness to the conduct that violated a court order. The threat must be to use force or violence against that person or that person's family. The threat must be made with the intent and the apparent ability to carry out the threat in a way to cause the target of the threat to reasonably fear for his or her safety or the safety of his or her immediate family.]

[Someone commits an act *willfully* when he or she does it willingly or on purpose.]

[Someone acts *maliciously* when he or she intentionally does a wrongful act or when he or she acts with the unlawful intent to disturb, defraud, annoy, or injure someone else.]

The People have the burden of proving this allegation beyond a reasonable doubt. If the People have not met this burden, you must find that this allegation has not been proved.

New January 2006

BENCH NOTES

Instructional Duty

If the defendant is charged with a felony for violating a court order based on a prior conviction and an act of violence or credible threat of violence, the court has a **sua sponte** duty to instruct on this sentencing factor.

This instruction **must** be given with CALCRIM No. 2701, *Violation of Court Order: Protective Order or Stay Away*.

The court must provide the jury with a verdict form on which the jury will indicate if the prosecution has or has not been proved the allegation.

The court must also give CALCRIM No. 3100, *Prior Conviction: Nonbifurcated Trial*, unless the defendant has stipulated to the conviction. If the court has granted a bifurcated trial on the prior conviction, use CALCRIM No. 3101, *Prior Conviction: Bifurcated Trial*.

AUTHORITY

- Enhancements. Pen. Code, §§ 166(c)(4), 273.6(d).

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Governmental Authority, § 30.

1 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 11, *Arrest*, § 11.02[1] (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, § 142.13[4] (Matthew Bender).

2704–2719. Reserved for Future Use

I. CRIMES INVOLVING PRISONERS

(i) Assault and Battery

2720. Assault by Prisoner Serving Life Sentence (Pen. Code, § 4500)

The defendant is charged [in Count _____] with assault with (force likely to produce great bodily injury/a deadly weapon) with malice aforethought, while serving a life sentence [in violation of Penal Code section 4500].

To prove that the defendant is guilty of this crime, the People must prove that:

<Alternative 1A—force with weapon>

- [1. The defendant did an act with a deadly weapon that by its nature would directly and probably result in the application of force to a person;]

<Alternative 1B—force without weapon>

- [1. The defendant did an act that by its nature would directly and probably result in the application of force to a person, and the force used was likely to produce great bodily injury;]
 2. The defendant did that act willfully;
 3. When the defendant acted, (he/she) was aware of facts that would lead a reasonable person to realize that (his/her) act by its nature would directly and probably result in the application of force to someone;
 4. When the defendant acted, (he/she) had the present ability to apply force (likely to produce great bodily injury/with a deadly weapon) to a person;
 5. The defendant acted with malice aforethought;
- [AND]

<Alternative 6A—defendant sentenced to life term>

- [6. When (he/she) acted, the defendant had been sentenced to a maximum term of life in state prison [in California](;/.)]

<Alternative 6B—defendant sentenced to life and to determinate term>

- [6. When (he/she) acted, the defendant had been sentenced to both a specific term of years and a maximum term of life in state prison [in California](;/.)]

<Give element 7 when self-defense or defense of another is an issue raised by the evidence.>

[AND

7. The defendant did not act (in self-defense/ [or] in defense of someone else).]

Someone commits an act *willfully* when he or she does it willingly or on purpose.

[The terms *application of force* and *apply force* mean to touch in a harmful or offensive manner. The slightest touching can be enough if it is done in a rude or angry way. Making contact with another person, including through his or her clothing, is enough. The touching does not have to cause pain or injury of any kind.]

[The touching can be done indirectly by causing an object [or someone else] to touch the other person.]

[The People are not required to prove that the defendant actually touched someone.]

No one needs to actually have been injured by defendant's act. But if someone was injured, you may consider that fact, along with all the other evidence, in deciding whether the defendant committed an assault[, and if so, what kind of assault it was].

[A *deadly weapon* is any object, instrument, or weapon that is inherently deadly or dangerous or one that is used in such a way that it is capable of causing and likely to cause death or great bodily injury.]

[*Great bodily injury* means significant or substantial physical injury. It is an injury that is greater than minor or moderate harm.]

[The term (*great bodily injury/deadly weapon*) is defined in another instruction.]

There are two kinds of *malice aforethought*, express malice and implied malice. Proof of either is sufficient to establish the state of mind required for this crime.

The defendant acted with *express malice* if (he/she) unlawfully intended to kill the person assaulted.

The defendant acted with *implied malice* if:

1. (He/She) intentionally committed an act.
2. The natural and probable consequences of the act were dangerous to human life.
3. At the time (he/she) acted, (he/she) knew (his/her) act was dangerous to human life.

AND

4. (He/She) deliberately acted with conscious disregard for human life.

Malice aforethought does not require hatred or ill will toward the victim. It is a mental state that must be formed before the act is committed. It does not require deliberation or the passage of any particular period of time.

[A person is *sentenced to a term in a state prison* if he or she is (sentenced to confinement in _____ <insert name of institution from Pen. Code, § 5003>/committed to the Department of Corrections and Rehabilitation[, Division of Juvenile Justice,]) by an order made according to law[, regardless of both the purpose of the (confinement/commitment) and the validity of the order directing the (confinement/commitment), until a judgment of a competent court setting aside the order becomes final]. [A person may be *sentenced to a term in a state prison* even if, at the time of the offense, he or she is confined in a local correctional institution pending trial or is temporarily outside the prison walls or boundaries for any permitted purpose, including but not limited to serving on a work detail.] [However, a prisoner who has been released on parole is *not sentenced to a term in a state prison*.]]

New January 2006; Revised February 2013, August 2016

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

If there is sufficient evidence of self-defense or defense of another, the court has a **sua sponte** duty to instruct on the defense. Give bracketed element 7 and any appropriate defense instructions. (See CALCRIM Nos. 3470–3477.)

In element 1, give alternative 1A if it is alleged the assault was committed with a deadly weapon. Give alternative 1B if it is alleged that the assault was committed with force likely to produce great bodily injury.

In element 6, give alternative 6A if the defendant was sentenced to only a life term. Give element 6B if the defendant was sentenced to both a life term and a determinate term. (*People v. Superior Court of Monterey (Bell)* (2002) 99 Cal.App.4th 1334, 1341 [121 Cal.Rptr.2d 836].)

Give the bracketed definition of “application of force and apply force” on request.

Give the relevant bracketed definitions unless the court has already given the definition in other instructions. In such cases, the court may give the bracketed sentence stating that the term is defined elsewhere.

On request, give the bracketed definition of “sentenced to a term in state prison.” Within that definition, give the bracketed portion that begins with “regardless of the purpose,” or the bracketed second or third sentence, if requested and relevant based on the evidence.

Do not give an attempt instruction in conjunction with this instruction. There is no crime of “attempted assault” in California. (*In re James M.* (1973) 9 Cal.3d 517, 519, 521–522 [108 Cal.Rptr. 89, 510 P.2d 33].)

Penal Code section 4500 provides that the punishment for this offense is death or life in prison without parole, unless “the person subjected to such assault does not die within a year and a day after” the assault. If this is an issue in the case, the court should consider whether the time of death should be submitted to the jury for a specific factual determination pursuant to *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 [120 S.Ct. 2348, 147 L.Ed.2d 435].

Defense—Instructional Duty

As with murder, the malice required for this crime may be negated by evidence of heat of passion or imperfect self-defense. (*People v. St. Martin* (1970) 1 Cal.3d 524, 530–531 [83 Cal.Rptr. 166, 463 P.2d 390]; *People v. Chacon* (1968) 69 Cal.2d 765, 780–781 [73 Cal.Rptr. 10, 447 P.2d 106]) If the evidence raises an issue about one or both of these potential defenses, the court has a **sua sponte** duty to give the appropriate instructions, CALCRIM No. 570, *Voluntary Manslaughter: Heat of Passion—Lesser Included Offense*, or CALCRIM No. 571, *Voluntary Manslaughter: Imperfect Self-Defense—Lesser Included Offense*. The court must modify these instructions for the charge of assault by a life prisoner.

Related Instructions

CALCRIM No. 875, *Assault With Deadly Weapon or Force Likely to Produce Great Bodily Injury*.

CALCRIM No. 520, *Murder With Malice Aforethought*.

AUTHORITY

- Elements of Assault by Life Prisoner. Pen. Code, § 4500.
- Elements of Assault With Deadly Weapon or Force Likely. Pen. Code, §§ 240, 245(a)(1)–(3) & (b).
- Willful Defined. Pen. Code, § 7(1); *People v. Lara* (1996) 44 Cal.App.4th 102, 107 [51 Cal.Rptr.2d 402].
- Deadly Weapon Defined. *People v. Aguilar* (1997) 16 Cal.4th 1023, 1028–1029 [68 Cal.Rptr.2d 655, 945 P.2d 1204].
- Least Touching. *People v. Myers* (1998) 61 Cal.App.4th 328, 335 [71 Cal.Rptr.2d 518] [citing *People v. Rocha* (1971) 3 Cal.3d 893, 899–900, fn. 12 [92 Cal.Rptr. 172, 479 P.2d 372]].
- Malice Equivalent to Malice in Murder. *People v. St. Martin* (1970) 1 Cal.3d 524, 536–537 [83 Cal.Rptr. 166, 463 P.2d 390]; *People v. Chacon* (1968) 69 Cal.2d 765, 780–781 [73 Cal.Rptr. 10, 447 P.2d 106].

- Malice Defined. Pen. Code, § 188; *People v. Dellinger* (1989) 49 Cal.3d 1212, 1217–1222 [264 Cal.Rptr. 841, 783 P.2d 200]; *People v. Nieto Benitez* (1992) 4 Cal.4th 91, 103–105 [13 Cal.Rptr.2d 864, 840 P.2d 969].
- Ill Will Not Required for Malice. *People v. Seden* (1974) 10 Cal.3d 703, 722 [112 Cal.Rptr. 1, 518 P.2d 913], overruled on other grounds in *People v. Flannel* (1979) 25 Cal.3d 668, 684, fn. 12 [160 Cal.Rptr. 84, 603 P.2d 1].
- Undergoing Sentence of Life. *People v. Superior Court of Monterey (Bell)* (2002) 99 Cal.App.4th 1334, 1341 [121 Cal.Rptr.2d 836].

Secondary Sources

1 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against the Person, §§ 58–60.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, § 142.11[3] (Matthew Bender).

LESSER INCLUDED OFFENSES

- Assault With Deadly Weapon or Force Likely to Produce Great Bodily Injury—Not a Prisoner. Pen. Code, § 245; see *People v. St. Martin* (1970) 1 Cal.3d 524, 536 [83 Cal.Rptr. 166, 463 P.2d 390]; *People v. Noah* (1971) 5 Cal.3d 469, 478–479 [96 Cal.Rptr. 441, 487 P.2d 1009].
- Assault. Pen. Code, § 240; *People v. Noah* (1971) 5 Cal.3d 469, 478–479 [96 Cal.Rptr. 441, 487 P.2d 1009].

Note: In *People v. Noah* (1971) 5 Cal.3d 469, 476–477 [96 Cal.Rptr. 441, 487 P.2d 1009], the court held that assault by a prisoner not serving a life sentence, Penal Code section 4501, is not a lesser included offense of assault by a prisoner serving a life sentence, Penal Code section 4500. The court based its conclusion on the fact that Penal Code section 4501 includes as an element of the offense that the prisoner was not serving a life sentence. However, Penal Code section 4501 was amended, effective January 1, 2005, to remove this element. The trial court should, therefore, consider whether Penal Code section 4501 is now a lesser included offense to Penal Code section 4500.

RELATED ISSUES

Status as Life Prisoner Determined on Day of Alleged Assault

Whether the defendant is sentenced to a life term is determined by his or her status on the day of the assault. (*People v. Superior Court of Monterey (Bell)* (2002) 99 Cal.App.4th 1334, 1341 [121 Cal.Rptr.2d 836]; *Graham v. Superior Court* (1979) 98 Cal.App.3d 880, 890 [160 Cal.Rptr. 10].) It does not matter if the conviction is later overturned or the sentence is later reduced to something less than life. (*People v. Superior Court of Monterey (Bell)*, *supra*, 99 Cal.App.4th at p. 1341; *Graham v. Superior Court*, *supra*, 98 Cal.App.3d at p. 890.)

Undergoing Sentence of Life

This statute applies to “[e]very person undergoing a life sentence . . .” (Pen. Code, § 4500.) In *People v. Superior Court of Monterey (Bell)* (2002) 99

Cal.App.4th 1334, 1341 [121 Cal.Rptr.2d 836], the defendant had been sentenced both to life in prison and to a determinate term and, at the time of the assault, was still technically serving the determinate term. The court held that he was still subject to prosecution under this statute, stating “a prisoner who commits an assault is subject to prosecution under section 4500 for the crime of assault by a life prisoner if, on the day of the assault, the prisoner was serving a sentence which potentially subjected him to actual life imprisonment, and therefore the prisoner might believe he had ‘nothing left to lose’ by committing the assault.” (*Ibid.*)

Error to Instruct on General Definition of Malice and General Intent

“Malice,” as used in Penal Code section 4500, has the same meaning as in the context of murder. (*People v. St. Martin* (1970) 1 Cal.3d 524, 536–537 [83 Cal.Rptr. 166, 463 P.2d 390]; *People v. Chacon* (1968) 69 Cal.2d 765, 780–781 [73 Cal.Rptr. 10, 447 P.2d 106].) Thus, it is error to give the general definition of malice found in Penal Code section 7, subdivision 4. (*People v. Jeter* (2005) 125 Cal.App.4th 1212, 1217 [23 Cal.Rptr.3d 402].) It is also error to instruct that Penal Code section 4500 is a general intent crime. (*Ibid.*)

2721. Assault by Prisoner (Pen. Code, § 4501)

The defendant is charged [in Count ____] with assault with (force likely to produce great bodily injury/a deadly weapon) while serving a state prison sentence [in violation of Penal Code section 4501].

To prove that the defendant is guilty of this crime, the People must prove that:

<Alternative 1A—force with weapon>

1. The defendant did an act with a deadly weapon that by its nature would directly and probably result in the application of force to a person;]

<Alternative 1B—force without weapon>

1. The defendant did an act that by its nature would directly and probably result in the application of force to a person, and the force used was likely to produce great bodily injury;]
2. The defendant did that act willfully;
3. When the defendant acted, (he/she) was aware of facts that would lead a reasonable person to realize that (his/her) act by its nature would directly and probably result in the application of force to someone;
4. When the defendant acted, (he/she) had the present ability to apply force (likely to produce great bodily injury/with a deadly weapon) to a person;

[AND]

5. When (he/she) acted, the defendant was confined in a [California] state prison(;/.)

<Give element 6 when self-defense or defense of another is an issue raised by the evidence.>

[AND]

6. The defendant did not act (in self-defense/ [or] in defense of someone else).]

Someone commits an act *willfully* when he or she does it willingly or on purpose. It is not required that he or she intend to break the law, hurt someone else, or gain any advantage.

[The terms *application of force* and *apply force* mean to touch in a harmful or offensive manner. The slightest touching can be enough if it is done in a rude or angry way. Making contact with another person, including through his or her clothing, is enough. The touching does not have to cause pain or injury of any kind.]

[The touching can be done indirectly by causing an object [or someone else] to touch the other person.]

[The People are not required to prove that the defendant actually touched someone.]

No one needs to actually have been injured by defendant's act. But if someone was injured, you may consider that fact, along with all the other evidence, in deciding whether the defendant committed an assault[, and if so, what kind of assault it was].

[A *deadly weapon* is any object, instrument, or weapon that is inherently deadly or dangerous or one that is used in such a way that it is capable of causing and likely to cause death or great bodily injury.]

[*Great bodily injury* means significant or substantial physical injury. It is an injury that is greater than minor or moderate harm.]

[The term (*great bodily injury/deadly weapon*) is defined in another instruction.]

A person is confined in a state prison if he or she is (confined in _____ <insert name of institution from Pen. Code, § 5003>/committed to the Department of Corrections and Rehabilitation[, Division of Juvenile Justice,]) by an order made according to law[, regardless of both the purpose of the (confinement/commitment) and the validity of the order directing the (confinement/commitment), until a judgment of a competent court setting aside the order becomes final]. [A person may be *confined in a state prison* even if, at the time of the offense, he or she is confined in a local correctional institution pending trial or is temporarily outside the prison walls or boundaries for any permitted purpose, including but not limited to serving on a work detail.] [However, a prisoner who has been released on parole is not *confined in a state prison*.]

New January 2006; Revised August 2016

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

If there is sufficient evidence of self-defense or defense of another, the court has a **sua sponte** duty to instruct on the defense. Give bracketed element 6 and any appropriate defense instructions. (See CALCRIM Nos. 3470–3477.)

In element 1, give alternative 1A if it is alleged the assault was committed with a deadly weapon. Give alternative 1B if it is alleged that the assault was committed with force likely to produce great bodily injury.

Give the bracketed definition of “application of force and apply force” on request.

Give the relevant bracketed definitions unless the court has already given the definition in other instructions. In such cases, the court may give the bracketed sentence stating that the term is defined elsewhere.

In the definition of “serving a sentence in a state prison,” give the bracketed portion that begins with “regardless of the purpose,” or the bracketed second or third sentence, if requested and relevant based on the evidence.

Do not give an attempt instruction in conjunction with this instruction. There is no crime of “attempted assault” in California. (*In re James M.* (1973) 9 Cal.3d 517, 519, 521–522 [108 Cal.Rptr. 89, 510 P.2d 33].)

Related Instructions

CALCRIM No. 875, *Assault With Deadly Weapon or Force Likely to Produce Great Bodily Injury*.

AUTHORITY

- Elements of Assault by Prisoner. Pen. Code, § 4501.
- Elements of Assault With Deadly Weapon or Force Likely to Produce Great Bodily Injury. Pen. Code, §§ 240, 245(a)(1)–(3) & (b).
- Willful Defined. Pen. Code, § 7(1); *People v. Lara* (1996) 44 Cal.App.4th 102, 107 [51 Cal.Rptr.2d 402].
- Deadly Weapon Defined. *People v. Aguilar* (1997) 16 Cal.4th 1023, 1028–1029 [68 Cal.Rptr.2d 655, 945 P.2d 1204].
- Least Touching. *People v. Myers* (1998) 61 Cal.App.4th 328, 335 [71 Cal.Rptr.2d 518] [citing *People v. Rocha* (1971) 3 Cal.3d 893, 899–900, fn. 12 [92 Cal.Rptr. 172, 479 P.2d 372]].
- Confined in State Prison Defined. Pen. Code, § 4504.
- Underlying Conviction Need Not Be Valid. *Wells v. California* (9th Cir. 1965) 352 F.2d 439, 442.

Secondary Sources

1 Witkin & Epstein, *California Criminal Law* (4th ed. 2012) Crimes Against the Person, §§ 61, 63.

6 Millman, Sevilla & Tarlow, *California Criminal Defense Practice*, Ch. 142, *Crimes Against the Person*, § 142.11[3] (Matthew Bender).

LESSER INCLUDED OFFENSES

- Assault With Deadly Weapon or Force Likely to Produce Great Bodily Injury—Not a Prisoner. Pen. Code, § 245; see *People v. Noah* (1971) 5 Cal.3d 469, 478–479 [96 Cal.Rptr. 441, 487 P.2d 1009].
- Assault. Pen. Code, § 240; *People v. Noah* (1971) 5 Cal.3d 469, 478–479 [96 Cal.Rptr. 441, 487 P.2d 1009].

RELATED ISSUES

Not Serving a Life Sentence

Previously, this statute did not apply to an inmate “undergoing a life sentence.”
(See *People v. Noah* (1971) 5 Cal.3d 469, 477 [96 Cal.Rptr. 441, 487 P.2d 1009].)
The statute has been amended to remove this restriction, effective January 1, 2005.
If the case predates this amendment, the court must add to the end of element 5,
“for a term other than life.”

2722. Battery by Gassing (Pen. Code, §§ 243.9, 4501.1)

The defendant is charged [in Count _____] with battery by gassing [in violation of _____ *<insert appropriate code section[s]>*].

To prove that the defendant is guilty of this crime, the People must prove that:

1. The defendant was (serving a sentence in a [California] state prison/confined in a local detention facility);
2. While so confined, the defendant intentionally committed an act of gassing, that is, (he/she) (placed[,]/ [or] threw[,]/ [or] caused to be placed or thrown) (human excrement/human urine/human bodily fluids or substances/a mixture containing human bodily substances) on the body of (a peace officer/an employee of a (state prison/local detention facility));

AND

3. The (excrement/urine/bodily fluids or substances/mixture) actually made contact with the skin [or membranes] of (a peace officer/an employee of a (state prison/local detention facility)).

[A person is *serving a sentence in a state prison* if he or she is (confined in _____ *<insert name of institution from Pen. Code, § 5003>*/committed to the Department of Corrections and Rehabilitation[, Division of Juvenile Justice,]) by an order made according to law[, regardless of both the purpose of the (confinement/commitment) and the validity of the order directing the (confinement/commitment), until a judgment of a competent court setting aside the order becomes final]. [A person may be *serving a sentence in a state prison* even if, at the time of the offense, he or she is confined in a local correctional institution pending trial or is temporarily outside the prison walls or boundaries for any permitted purpose, including but not limited to serving on a work detail.] [However, a prisoner who has been released on parole is not *serving a sentence in a state prison*.]

[A (county jail/city jail/_____ *<insert description>*) is a *local detention facility*.]

[A sworn member of _____ *<insert name of agency that employs peace officer>*, authorized by _____ *<insert appropriate section from Pen. Code, § 830 et seq.>* to _____ *<describe statutory authority>*, is a *peace officer*.]

BENCH NOTES***Instructional Duty***

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

If the battery is charged under Penal Code section 4501.1, in element 1, use the phrase “serving a sentence in state prison” and the bracketed definition of this phrase. If the battery is charged under Penal Code section 243.9, in element 1, give the language referencing a “local detention facility” and the bracketed definition of local detention facility.

When giving the definition of “serving a sentence in a state prison,” give the bracketed portion that begins “regardless of the purpose,” or the bracketed second or third sentence, if requested and relevant based on the evidence.

The jury must determine whether the alleged victim was a peace officer. (*People v. Flood* (1998) 18 Cal.4th 470, 482 [76 Cal.Rptr.2d 180, 957 P.2d 869].) The court must instruct the jury in the appropriate definition of “peace officer” from the statute. (*Ibid.*) It is error for the court to instruct that the witness is a peace officer as a matter of law. (*Ibid.* [instruction that “Officer Bridgeman and Officer Gurney are peace officers” was error].)

AUTHORITY

- Elements. Pen. Code, §§ 242, 243.9, 4501.1.
- Confined in State Prison Defined. Pen. Code, § 4504.
- Local Detention Facility Defined. Pen. Code, § 6031.4.

LESSER INCLUDED OFFENSES

- Battery by Prisoner on Non-Prisoner. *People v. Flores* (2009) 176 Cal.App.4th 924, 929 [97 Cal.Rptr.3d 924].

Secondary Sources

1 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against the Person, §§ 13–15, 62.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, § 142.12 (Matthew Bender).

2723. Battery by Prisoner on Nonprisoner (Pen. Code, § 4501.5)

The defendant is charged [in Count _____] with battery on someone who was not a prisoner [in violation of Penal Code section 4501.5].

To prove that the defendant is guilty of this crime, the People must prove that:

1. The defendant willfully touched _____ *<insert name of person allegedly battered, excluding title of law enforcement agent>* in a harmful or offensive manner;
2. When (he/she) acted, the defendant was serving a sentence in a [California] state prison;

[AND]

3. _____ *<insert name of person allegedly battered, excluding title of law enforcement agent>* was not serving a sentence in state prison(;/.)

<Give element 4 when self-defense or defense of another is an issue raised by the evidence.>

[AND]

4. The defendant did not act (in self-defense/ [or] in defense of someone else).]

Someone commits an act *willfully* when he or she does it willingly or on purpose. It is not required that he or she intend to break the law, hurt someone else, or gain any advantage.

The slightest touching can be enough to commit a battery if it is done in a rude or angry way. Making contact with another person, including through his or her clothing, is enough. The touching does not have to cause pain or injury of any kind.

[The touching can be done indirectly by causing an object [or someone else] to touch the other person.]

A person is *serving a sentence in a state prison* if he or she is (confined in _____ *<insert name of institution from Pen. Code, § 5003>*/committed to the Department of (Corrections and Rehabilitation, Division of Juvenile Justice/Corrections and Rehabilitation)) by an order made according to law[, regardless of both the purpose of the (confinement/commitment) and the validity of the order directing the (confinement/commitment), until a judgment of a competent court setting aside the order becomes final]. [A person may be *serving a sentence in a state prison* even if, at the time of the offense,

he or she is confined in a local correctional institution pending trial or is temporarily outside the prison walls or boundaries for any permitted purpose, including but not limited to serving on a work detail.]
 [However, a prisoner who has been released on parole is not *serving a sentence in a state prison*.]

<When lawful performance is an issue, give the following paragraph and Instruction 2671, *Lawful Performance: Custodial Officer*.>

[A custodial officer is not lawfully performing his or her duties if he or she is using unreasonable or excessive force in his or her duties. Instruction 2671 explains when force is unreasonable or excessive.]

New January 2006; Revised March 2017

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

If there is sufficient evidence of self-defense or defense of another, the court has a **sua sponte** duty to instruct on the defense. Give bracketed element 4 and any appropriate defense instructions. (See CALCRIM Nos. 3470–3477.)

The court has a **sua sponte** duty to instruct on defendant’s reliance on self-defense as it relates to the use of excessive force. (See *People v. Coleman* (1978) 84 Cal.App.3d 1016, 1022–1023 [149 Cal.Rptr. 134]; *People v. White* (1980) 101 Cal.App.3d 161, 167–168 [161 Cal.Rptr. 541]; *People v. Olguin* (1981) 119 Cal.App.3d 39, 46–47 [173 Cal.Rptr. 663].) If there is evidence of excessive force, give bracketed element 4, the last bracketed paragraph, and the appropriate portions of CALCRIM No. 2671, *Lawful Performance: Custodial Officer*.

Give the bracketed paragraph on indirect touching if that is an issue.

In the definition of “serving a sentence in a state prison,” give the bracketed portion that begins with “regardless of the purpose,” or the bracketed second or third sentence, if requested and relevant based on the evidence.

Related Instructions

CALCRIM No. 960, *Simple Battery*.

AUTHORITY

- Elements of Battery by Prisoner on Nonprisoner. Pen. Code, § 4501.5.
- Elements of Battery. Pen. Code, § 242; see *People v. Martinez* (1970) 3 Cal.App.3d 886, 889 [83 Cal.Rptr. 914] [harmful or offensive touching].
- Willful Defined. Pen. Code, § 7(1); *People v. Lara* (1996) 44 Cal.App.4th 102, 107 [51 Cal.Rptr.2d 402].
- Least Touching. *People v. Myers* (1998) 61 Cal.App.4th 328, 335 [71

Cal.Rptr.2d 518] [citing *People v. Rocha* (1971) 3 Cal.3d 893, 899–900, fn. 12 [92 Cal.Rptr. 172, 479 P.2d 372]].

- Confined in State Prison Defined. Pen. Code, § 4504.
- Underlying Conviction Need Not Be Valid. *Wells v. California* (9th Cir. 1965) 352 F.2d 439, 442.

Secondary Sources

1 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against the Person, §§ 13–16, 57.

1 Witkin & Epstein, California Criminal Law (4th ed. 2012) Defenses, § 69.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, § 142.12 (Matthew Bender).

LESSER INCLUDED OFFENSES

- Simple Battery. Pen. Code, § 242.
- Assault. Pen. Code, § 240.

2724–2734. Reserved for Future Use

(ii) Hostage Taking and Rioting

2735. Holding a Hostage (Pen. Code, § 4503)

The defendant is charged [in Count _____] with holding a hostage [in violation of Penal Code section 4503].

To prove that the defendant is guilty of this crime, the People must prove that:

1. The defendant (held a person hostage/ [or] held a person against his or her will, by force or threat of force, in defiance of official orders) inside a (prison/facility under the jurisdiction of the Department of Corrections);

AND

2. When the defendant acted, (he/she) was serving a sentence in a [California] state prison.

A person is *serving a sentence in a state prison* if he or she is (confined in _____ <insert name of institution from Pen. Code, § 5003>/committed to the Department of Corrections and Rehabilitation[, Division of Juvenile Justice,]) by an order made according to law[, regardless of both the purpose of the (confinement/commitment) and the validity of the order directing the (confinement/commitment), until a judgment of a competent court setting aside the order becomes final]. [A person may be *serving a sentence in a state prison* even if, at the time of the offense, he or she is confined in a local correctional institution pending trial or is temporarily outside the prison walls or boundaries for any permitted purpose, including but not limited to serving on a work detail.] [However, a prisoner who has been released on parole is not *serving a sentence in a state prison*.]

New January 2006; Revised August 2016

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

In the definition of “serving a sentence in a state prison,” give the bracketed portion that begins with “regardless of the purpose,” or the bracketed second or third sentence, if requested and relevant based on the evidence.

AUTHORITY

- Elements. Pen. Code, § 4503.

- Confined in State Prison Defined. Pen. Code, § 4504.
- Underlying Conviction Need Not Be Valid. Wells v. California (9th Cir. 1965) 352 F.2d 439, 442.

Secondary Sources

1 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against the Person, § 291.

2736. Inciting a Riot in a Prison or Jail (Pen. Code, § 404.6(c))

The defendant is charged [in Count _____] with inciting a riot [in a (state prison/county jail)] [in violation of Penal Code section 404.6(c)].

To prove that the defendant is guilty of this crime, the People must prove that:

1. The defendant (did an act [or engaged in conduct] that encouraged a riot[,]/ [or] urged others to commit acts of force or violence[,]/ [or] urged others to (burn/ [or] destroy) property);
2. The defendant acted at a time and place and under circumstances that produced a clear, present, and immediate danger that (acts of force or violence would happen/ [or] property would be (burned/ [or] destroyed));
3. When the defendant acted, (he/she) intended to cause a riot;
4. As a result of the defendant's action [or conduct], a riot occurred [in a (state prison/county jail)];

AND

5. The riot resulted in serious bodily injury to someone.

A *riot* occurs when two or more people, acting together and without legal authority, disturb the public peace by using force or violence or by threatening to use force or violence with the immediate ability to carry out those threats. [A disturbance of the public peace may happen in any place of confinement, including a (state prison/ [or] county jail).]

A *serious bodily injury* means a serious impairment of physical condition. Such an injury may include[, but is not limited to]: (loss of consciousness/ concussion/ bone fracture/ protracted loss or impairment of function of any bodily member or organ/ a wound requiring extensive suturing/ [and] serious disfigurement).

[To *commit acts of force or violence* means to wrongfully [and unlawfully] apply physical force to the property or person of another.]

New January 2006

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

The defendant may admit to the fact that the incident occurred in a state prison or

county jail. (Pen. Code, § 404.6(d).) If the defendant makes such an admission, the court should delete all bracketed references to state prison or county jail. If the defendant does not make such an admission, the court should give the bracketed portions referring to state prison or county jail.

AUTHORITY

- Elements. Pen. Code, § 404.6(c).
- Riot Defined. Pen. Code, § 404.
- Serious Bodily Injury Defined. Pen. Code, § 243(f)(4); *People v. Taylor* (2004) 118 Cal.App.4th 11, 25, fn. 4 [12 Cal.Rptr.3d 693].
- Force or Violence Defined. See *People v. Lozano* (1987) 192 Cal.App.3d 618, 627 [237 Cal.Rptr. 612]; *People v. Bravott* (1986) 183 Cal.App.3d 93, 97 [227 Cal.Rptr. 810].
- Statute Constitutional. *People v. Davis* (1968) 68 Cal.2d 481, 484–487 [67 Cal.Rptr. 547, 439 P.2d 651].
- Terms of Statute Understandable. *People v. Jones* (1971) 19 Cal.App.3d 437, 447 [96 Cal.Rptr. 795].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, § 14.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 144, *Crimes Against Order*, § 144.21 (Matthew Bender).

RELATED ISSUES

Defendant Must Urge Others

To be guilty of inciting a riot, the defendant must urge others to commit acts of force or property destruction. (*People v. Boyd* (1985) 38 Cal.3d 762, 778 [215 Cal.Rptr. 1, 700 P.2d 782]; *In re Wagner* (1981) 119 Cal.App.3d 90, 106 [173 Cal.Rptr. 766].) Thus, in *In re Wagner, supra*, 119 Cal.App.3d at p. 106, the court held that the evidence was insufficient to establish incitement to riot where the defendant was observed throwing rocks at the police. (*Ibid.*)

2737–2744. Reserved for Future Use

(iii) Possession of Contraband

2745. Possession or Manufacture of Weapon in Penal Institution (Pen. Code, § 4502)

The defendant is charged [in Count _____] with (possessing[,]/ [or] manufacturing[,]/ [or] attempting to manufacture) a weapon, specifically [(a/an)] _____ *<insert type of weapon from Pen. Code, § 4502, e.g., “explosive”>*, while (in a penal institution/being taken to or from a penal institution/under the custody of an (official/officer/employee) of a penal institution) [in violation of Penal Code section 4502].

To prove that the defendant is guilty of this crime, the People must prove that:

1. The defendant was (present at or confined in a penal institution/ being taken to or from a penal institution/under the custody of an (official/officer/employee) of a penal institution);
2. The defendant (possessed[,]/ [or] carried on (his/her) person[,]/ [or] had under (his/her) custody or control[,]/ [or] manufactured[,]/ [or] attempted to manufacture) [(a/an)] _____ *<insert type of weapon from Pen. Code, § 4502, e.g., “explosive”>*;
3. The defendant knew that (he/she) (possessed[,]/ [or] carried on (his/her) person[,]/ [or] had under (his/her) custody or control[,]/ [or] manufactured[,]/ [or] attempted to manufacture) the _____ *<insert type of weapon from Pen. Code, § 4502, e.g., “explosive”>*;

AND

4. The defendant knew that the object (was [(a/an)] _____ *<insert type of weapon from Pen. Code, § 4502, e.g., “explosive”>* could be used _____ *<insert description of weapon’s use, e.g., “as a stabbing weapon,” or “for purposes of offense or defense”>*).

A *penal institution* is a (state prison[,]/ [or] prison camp or farm[,]/ [or] county jail[,]/ [or] county road camp).

[*Metal knuckles* means any device or instrument made wholly or partially of metal that is worn in or on the hand for purposes of offense or defense and that either protects the wearer’s hand while striking a blow or increases the injury or force of impact from the blow. The metal contained in the device may help support the hand or fist, provide a shield to protect it, or consist of projections or studs that would contact the individual receiving a blow.]

[An *explosive* is any substance, or combination of substances, (1) whose main or common purpose is to detonate or rapidly combust and (2) which is capable of a relatively instantaneous or rapid release of gas and heat.]

[An *explosive* is also any substance whose main purpose is to be combined with other substances to create a new substance that can release gas and heat rapidly or relatively instantaneously.]

[_____ <insert type of explosive from Health & Saf. Code, § 12000> (is/are) [an] *explosive[s]*.]

[*Fixed ammunition* is a projectile and powder enclosed together in a case ready for loading.]

[A *dirk or dagger* is a knife or other instrument, with or without a handguard, that is capable of ready use as a stabbing weapon that may inflict great bodily injury or death.] [*Great bodily injury* means significant or substantial physical injury. It is an injury that is greater than minor or moderate harm.]

[A *firearm* is any device designed to be used as a weapon, from which a projectile is discharged or expelled through a barrel by the force of an explosion or other form of combustion.] [A firearm need not be in working order if it was designed to shoot and appears capable of shooting.]

[*Tear gas* is a liquid, gaseous, or solid substance intended to produce temporary physical discomfort or permanent injury when vaporized or otherwise dispersed in the air.]

[A *tear gas weapon* is a shell, cartridge, or bomb capable of being discharged or exploded to release or emit tear gas.] [A *tear gas weapon* [also] means a revolver, pistol, fountain pen gun, billy, or other device, portable or fixed, intended specifically to project or release tear gas.] [A *tear gas weapon* does not include a device regularly manufactured and sold for use with firearm ammunition.]

[[A/An] _____ <insert type of weapon from Pen. Code, § 4502, not covered in above definitions> (is/means/includes) _____ <insert appropriate definition, see Bench Notes>.]

The People do not have to prove that the defendant used or intended to use the object as a weapon.

[You may consider evidence that the object could be used in a harmless way in deciding if the object is (a/an) _____ <insert type of weapon from Pen. Code, § 4502>, as defined here.]

[The People do not have to prove that the object was (concealable[,]/ [or] carried by the defendant on (his/her) person[,]/ [or] (displayed/ visible)).]

[Two or more people may possess something at the same time.]

[A person does not have to actually hold or touch something to possess it. It is enough if the person has (control over it/ [or] the right to control it), either personally or through another person.]

[The People allege that the defendant (possessed[,]/ [or] carried on (his/her) person[,]/ [or] had under (his/her) custody or control[,]/ [or] manufactured[,]/ [or] attempted to manufacture) the following weapons:

_____ *<insert description of each weapon when multiple items alleged>*. You may not find the defendant guilty unless all of you agree that the People have proved that the defendant (possessed[,]/ [or] carried on (his/her) person[,]/ [or] had under (his/her) custody or control[,]/ [or] manufactured[,]/ [or] attempted to manufacture) at least one of these weapons and you all agree on which weapon (he/she) (possessed[,]/ [or] carried on (his/her) person[,]/ [or] had under (his/her) custody or control[,]/ [or] manufactured[,]/ [or] attempted to manufacture).]

New January 2006; Revised February 2012

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

Where indicated in the instruction, insert one or more of the following weapons from Penal Code section 4502, based on the evidence presented:

metal knuckles

explosive substance

fixed ammunition

dirk or dagger

sharp instrument

pistol, revolver, or other firearm

tear gas or tear gas weapon

an instrument or weapon of the kind commonly known as a blackjack, slungshot, billy, sandclub, sandbag

Following the elements, give the appropriate definition of the alleged weapon. If the prosecution alleges that the defendant possessed an “instrument or weapon of the kind commonly known as a blackjack, slungshot, billy, sandclub, [or] sandbag,” the court should give an appropriate definition based on case law. (See *People v.*

Fannin (2001) 91 Cal.App.4th 1399, 1402 [111 Cal.Rptr.2d 496] [definition of “slungshot”]; *People v. Mulherin* (1934) 140 Cal.App. 212, 215 [35 P.2d 174] [definition of this class of weapons].)

If the prosecution alleges under a single count that the defendant possessed multiple weapons, the court has a **sua sponte** duty to instruct on unanimity. (See *People v. Wolfe* (2003) 114 Cal.App.4th 177, 184–185 [7 Cal.Rptr.3d 483]; *People v. Rowland* (1999) 75 Cal.App.4th 61, 65 [88 Cal.Rptr.2d 900].) Give the bracketed paragraph that begins with “The People allege that the defendant possessed,” inserting the items alleged.

If there is sufficient evidence of a harmless use for the object possessed, give the bracketed sentence that begins with “You may consider evidence that the object could be used in a harmless way” (*People v. Savedra* (1993) 15 Cal.App.4th 738, 743–744 [19 Cal.Rptr.2d 115].)

If the prosecution alleges that the defendant attempted to manufacture a weapon, give CALCRIM No. 460, *Attempt Other Than Attempted Murder*.

It is unclear if the defense of momentary possession for disposal applies to a charge of weapons possession in a penal institution. In *People v. Brown* (2000) 82 Cal.App.4th 736, 740 [98 Cal.Rptr.2d 519], the court held that the defense was not available on the facts of the case before it but declined to consider whether “there can ever be a circumstance justifying temporary possession in a penal institution.” (*Ibid.* [emphasis in original].) The California Supreme Court has reaffirmed that the momentary possession defense is available to a charge of illegal possession of a weapon. (*People v. Martin* (2001) 25 Cal.4th 1180, 1191–1192 [108 Cal.Rptr.2d 599, 25 P.3d 1081].) However, the Supreme Court has yet to determine whether the defense is available in a penal institution. If the trial court determines that an instruction on momentary possession is warranted on the facts of the case before it, give a modified version of the instruction on momentary possession contained in CALCRIM No. 2510, *Possession of Firearm by Person Prohibited Due to Conviction—No Stipulation to Conviction*.

If there is sufficient evidence of imminent death or bodily injury, the defendant may be entitled to an instruction on the defense of duress or threats. (*People v. Otis* (1959) 174 Cal.App.2d 119, 125–126 [344 P.2d 342].) Give CALCRIM No. 3402, *Duress or Threats*, modified as necessary.

AUTHORITY

- Elements. Pen. Code, § 4502.
- Metal Knuckles Defined. Pen. Code, § 21810.
- Explosive Defined. Health & Saf. Code, § 12000.
- Fixed Ammunition. *The Department of Defense Dictionary of Military Terms*, http://www.dtic.mil/doctrine/dod_dictionary/ (accessed January 11, 2012).
- Dirk or Dagger Defined. Pen. Code, § 16470.
- Firearm Defined. Pen. Code, § 16520.

- Tear Gas Defined. Pen. Code, § 17240.
- Tear Gas Weapon Defined. Pen. Code, § 17250.
- Blackjack, etc., Defined. *People v. Fannin* (2001) 91 Cal.App.4th 1399, 1402 [111 Cal.Rptr.2d 496]; *People v. Mulherin* (1934) 140 Cal.App. 212, 215 [35 P.2d 174].
- Knowledge. See *People v. Rubalcava* (2000) 23 Cal.4th 322, 331–332 [96 Cal.Rptr.2d 735]; *People v. Reynolds* (1988) 205 Cal.App.3d 776, 779 [252 Cal.Rptr. 637], overruled on other grounds, *People v. Flood* (1998) 18 Cal.4th 470, 484 [76 Cal.Rptr.2d 180, 957 P.2d 869].
- Harmless Use. *People v. Savedra* (1993) 15 Cal.App.4th 738, 743–744 [19 Cal.Rptr.2d 115]; *People v. Martinez* (1998) 67 Cal.App.4th 905, 910–913 [79 Cal.Rptr.2d 334].
- Unanimity. *People v. Wolfe* (2003) 114 Cal.App.4th 177, 184–185 [7 Cal.Rptr.3d 483].
- Constructive vs. Actual Possession. *People v. Reynolds* (1988) 205 Cal.App.3d 776, 782, fn. 5 [252 Cal.Rptr. 637], overruled on other grounds in *People v. Flood* (1998) 18 Cal.4th 470, 484 [76 Cal.Rptr.2d 180, 957 P.2d 869].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, §§ 182, 184.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 85, *Submission to Jury and Verdict*, § 85.02[2][a][i] (Matthew Bender).

5 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 94, *Prisoners' Rights*, § 94.04 (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 144, *Crimes Against Order*, § 144.01 (Matthew Bender).

RELATED ISSUES

Administrative Punishment Does Not Bar Criminal Action

“[P]rison disciplinary measures do not bar subsequent prosecution in a criminal action for violation of a penal statute prohibiting the same act which was the basis of the prison discipline by virtue of the proscription against double punishment provided in section 654 [citation] or by the proscription against double jeopardy provided in the California Constitution (art. I, § 13) and section 1023.” (*People v. Vattelli* (1971) 15 Cal.App.3d 54, 58 [92 Cal.Rptr. 763] [citing *People v. Eggleston* (1967) 255 Cal.App.2d 337, 340 [63 Cal.Rptr. 104]].)

Possession of Multiple Weapons at One Time Supports Only One Conviction

“[D]efendant is subject to only one conviction for his simultaneous possession of three sharp wooden sticks in prison.” (*People v. Rowland* (1999) 75 Cal.App.4th 61, 65 [88 Cal.Rptr.2d 900].)

2746. Possession of Firearm, Deadly Weapon, or Explosive in a Jail or County Road Camp (Pen. Code, § 4574(a))

The defendant is charged [in Count _____] with possessing a weapon while confined in a (jail/county road camp) [in violation of Penal Code section 4574(a)].

To prove that the defendant is guilty of this crime, the People must prove that:

1. The defendant was lawfully confined in a (jail/county road camp);
2. While confined there, the defendant [unlawfully] possessed [(a/an)] (firearm[,]/ [or] deadly weapon[,]/ [or] explosive[,]/ [or] tear gas[,]/ [or] tear gas weapon) within the (jail/county road camp);
3. The defendant knew that (he/she) possessed the (firearm[,]/ [or] deadly weapon[,]/ [or] explosive[,]/ [or] tear gas[,]/ [or] tear gas weapon);

AND

4. The defendant knew that the object was [(a/an)] (firearm[,]/ [or] deadly weapon[,]/ [or] explosive[,]/ [or] tear gas[,]/ [or] tear gas weapon).

[A *jail* is a place of confinement where people are held in lawful custody.]

[A *firearm* is any device designed to be used as a weapon, from which a projectile is discharged or expelled through a barrel by the force of an explosion or other form of combustion.] [A firearm need not be in working order if it was designed to shoot and appears capable of shooting.]

[As used here, a *deadly weapon* is any weapon, instrument, or object that has the reasonable potential of being used in a manner that would cause great bodily injury or death.] [*Great bodily injury* means significant or substantial physical injury. It is an injury that is greater than minor or moderate harm.]

[An *explosive* is any substance, or combination of substances, (1) whose main or common purpose is to detonate or rapidly combust and (2) which is capable of a relatively instantaneous or rapid release of gas and heat.]

[An *explosive* is also any substance whose main purpose is to be combined with other substances to create a new substance that can release gas and heat rapidly or relatively instantaneously.]

[_____ <insert type of explosive from Health & Saf. Code, § 12000> (is/are) [an] explosive[s].]

[Tear gas is a liquid, gaseous, or solid substance intended to produce temporary physical discomfort or permanent injury through being vaporized or otherwise dispersed in the air.]

[A tear gas weapon is a shell, cartridge, or bomb capable of being discharged or exploded to release or emit tear gas.] [A tear gas weapon [also] means a revolver, pistol, fountain pen gun, billy, or other device, portable or fixed, intended specifically to project or release tear gas.] [A tear gas weapon does not include a device regularly manufactured and sold for use with firearm ammunition.]

The People do not have to prove that the defendant used or intended to use the object as a weapon.

[You may consider evidence that the object could be used in a harmless way in deciding whether the object is a deadly weapon as defined here.]

[The People do not have to prove that the object was (concealable[,]/ [or] carried by the defendant on (his/her) person[,]/ [or] (displayed/ visible)).]

[Two or more people may possess something at the same time.]

[A person does not have to actually hold or touch something to possess it. It is enough if the person knowingly has (control over it/ [or] the right to control it), either personally or through another person).]

[The People allege that the defendant possessed the following weapons: _____ <insert description of each weapon when multiple items alleged>. You may not find the defendant guilty unless all of you agree that the People have proved that the defendant possessed at least one of these weapons and you all agree on which weapon (he/she) possessed.]

<Defense: Possession Authorized>

[The defendant is not guilty of this offense if (he/she) was authorized to possess the weapon by (law[,]/ [or] a person in charge of the (jail/county road camp)[,]/ [or] an officer of the (jail/county road camp) empowered by the person in charge of the (jail/camp) to give such authorization). The People have the burden of proving beyond a reasonable doubt that the defendant was not authorized to possess the weapon. If the People have not met this burden, you must find the defendant not guilty of this offense.]

BENCH NOTES***Instructional Duty***

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

If the prosecution alleges under a single count that the defendant possessed multiple weapons, the court has a **sua sponte** duty to instruct on unanimity. (See *People v. Wolfe* (2003) 114 Cal.App.4th 177, 184–185 [7 Cal.Rptr.3d 483]; *People v. Rowland* (1999) 75 Cal.App.4th 61, 65 [88 Cal.Rptr.2d 900].) Give the bracketed paragraph that begins with “The People allege that the defendant possessed,” inserting the items alleged.

Note that the definition of “deadly weapon” in the context of Penal Code section 4574 differs from the definition given in other instructions. (*People v. Martinez* (1998) 67 Cal.App.4th 905, 909 [79 Cal.Rptr.2d 334].)

If there is sufficient evidence of a harmless use for the object possessed, give the bracketed sentence that begins with “You may consider evidence that the object could be used in a harmless way” (*People v. Savedra* (1993) 15 Cal.App.4th 738, 743–744 [19 Cal.Rptr.2d 115].)

If there is sufficient evidence that the defendant was authorized to possess the weapon, give the bracketed word “unlawfully” in element 2. Give also the bracketed paragraph headed “Defense: Possession Authorized.”

It is unclear if the defense of momentary possession for disposal applies to a charge of weapons possession in a penal institution. In *People v. Brown* (2000) 82 Cal.App.4th 736, 740 [98 Cal.Rptr.2d 519], the court held that the defense was not available on the facts of the case before it but declined to consider whether “there can ever be a circumstance justifying temporary possession in a penal institution.” (*Ibid.* [emphasis in original].) The California Supreme Court has reaffirmed that the momentary possession defense is available to a charge of illegal possession of a weapon. (*People v. Martin* (2001) 25 Cal.4th 1180, 1191–1192 [108 Cal.Rptr.2d 599, 25 P.3d 1081].) However, the Supreme Court has yet to determine whether the defense is available in a penal institution. If the trial court determines that an instruction on momentary possession is warranted on the facts of the case before it, give a modified version of the instruction on momentary possession contained in CALCRIM No. 2510, *Possession of Firearm by Person Prohibited Due to Conviction—No Stipulation to Conviction*.

If there is sufficient evidence of imminent death or bodily injury, the defendant may be entitled to an instruction on the defense of duress or threats. (*People v. Otis* (1959) 174 Cal.App.2d 119, 125–126 [344 P.2d 342].) Give CALCRIM No. 3402, *Duress or Threats*, modified as necessary.

AUTHORITY

- Elements. Pen. Code, § 4574(a).
- Firearm Defined. Pen. Code, § 16520.

- Explosive Defined. Health & Saf. Code, § 12000.
- Tear Gas Defined. Pen. Code, § 17240.
- Tear Gas Weapon Defined. Pen. Code, § 17250.
- Deadly Weapon Defined. *People v. Martinez* (1998) 67 Cal.App.4th 905, 909 [79 Cal.Rptr.2d 334].
- Jail Defined. *People v. Carter* (1981) 117 Cal.App.3d 546, 550 [172 Cal.Rptr. 838].
- Knowledge. See *People v. Rubalcava* (2000) 23 Cal.4th 322, 331–332 [96 Cal.Rptr.2d 735, 1 P.3d 52]; *People v. James* (1969) 1 Cal.App.3d 645, 650 [81 Cal.Rptr. 845].
- Harmless Use. *People v. Savedra* (1993) 15 Cal.App.4th 738, 743–744 [19 Cal.Rptr.2d 115]; *People v. Martinez* (1998) 67 Cal.App.4th 905, 910–913 [79 Cal.Rptr.2d 334].
- Unanimity. *People v. Wolfe* (2003) 114 Cal.App.4th 177, 184–185 [7 Cal.Rptr.3d 483].
- Firearm Need Not Be Operable. *People v. Talkington* (1983) 140 Cal.App.3d 557, 563 [189 Cal.Rptr. 735].
- Constructive vs. Actual Possession. *People v. Reynolds* (1988) 205 Cal.App.3d 776, 782, fn. 5 [252 Cal.Rptr. 637], overruled on other grounds, *People v. Flood* (1998) 18 Cal.4th 470, 484 [76 Cal.Rptr.2d 180, 957 P.2d 869].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, §§ 182, 184.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 85, *Submission to Jury and Verdict*, § 85.02[2][a][i] (Matthew Bender).

5 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 94, *Prisoners' Rights*, § 94.04 (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 144, *Crimes Against Order*, § 144.01 (Matthew Bender).

RELATED ISSUES

Administrative Punishment Does Not Bar Criminal Action

“[P]rison disciplinary measures do not bar subsequent prosecution in a criminal action for violation of a penal statute prohibiting the same act which was the basis of the prison discipline by virtue of the proscription against double punishment provided in section 654 [citation] or by the proscription against double jeopardy provided in the California Constitution (art. I, § 13) and section 1023.” (*People v. Vattelli* (1971) 15 Cal.App.3d 54, 58 [92 Cal.Rptr. 763]; [citing *People v. Eggleston* (1967) 255 Cal.App.2d 337, 340 [63 Cal.Rptr. 104]].)

**2747. Bringing or Sending Firearm, Deadly Weapon, or Explosive
Into Penal Institution (Pen. Code, § 4574(a)–(c))**

The defendant is charged [in Count _____] with (bringing/sending/ [or] assisting in (bringing/sending)) a weapon into a penal institution [in violation of Penal Code section 4574].

To prove that the defendant is guilty of this crime, the People must prove that:

1. The defendant [unlawfully] (brought/sent/ [or] assisted in (bringing/sending)) [(a/an)] (firearm[,]/ [or] deadly weapon[,]/ [or] explosive[,]/ [or] tear gas[,]/ [or] tear gas weapon) into a penal institution [or onto the grounds (of/ [or] adjacent to) a penal institution];
2. The defendant knew that (he/she) was (bringing/sending/ [or] assisting in (bringing/sending)) an object into a penal institution [or onto the grounds (of/ [or] adjacent to) a penal institution];

AND

3. The defendant knew that the object was [(a/an)] (firearm[,]/ [or] deadly weapon[,]/ [or] explosive[,]/ [or] tear gas[,]/ [or] tear gas weapon).

A *penal institution* is a (state prison[,]/ [or] prison camp or farm[,]/ [or] jail[,]/ [or] county road camp[,]/ [or] place where prisoners of the state prison are located under the custody of prison officials, officers, or employees).

[A *firearm* is any device designed to be used as a weapon, from which a projectile is discharged or expelled through a barrel by the force of an explosion or other form of combustion.] [A firearm need not be in working order if it was designed to shoot and appears capable of shooting.]

[As used here, a *deadly weapon* is any weapon, instrument or object that has the reasonable potential of being used in a manner that would cause great bodily injury or death.] [Great bodily injury means significant or substantial physical injury. It is an injury that is greater than minor or moderate harm.]

[An *explosive* is any substance, or combination of substances, (1) whose main or common purpose is to detonate or rapidly combust and (2) which is capable of a relatively instantaneous or rapid release of gas and heat.]

[An *explosive* is also any substance whose main purpose is to be

combined with other substances to create a new substance that can release gas and heat rapidly or relatively instantaneously.]

[_____ <insert type[s] of explosive[s] from Health & Saf. Code, § 12000> (is/are) [an] *explosive[s]*.]

[*Tear gas* means a liquid, gaseous, or solid substance intended to produce temporary physical discomfort or permanent injury through being vaporized or otherwise dispersed in the air.]

[A *tear gas weapon* means any shell, cartridge, or bomb capable of being discharged or exploded to release or emit tear gas.] [A *tear gas weapon* [also] means a revolver, pistol, fountain pen gun, billy, or other device, portable or fixed, intended specifically to project or release tear gas.] [A *tear gas weapon* does not include a device regularly manufactured and sold for use with firearm ammunition.]

The People do not have to prove that the defendant used or intended to use the object as a weapon.

[You may consider evidence that the object could be used in a harmless way in deciding if the object is a deadly weapon as defined here.]

[The People do not have to prove that the object was (concealable[,]/ [or] carried by the defendant on (his/her) person[,]/ [or] (displayed/ visible)).]

[The People allege that the defendant (brought/sent/ [or] assisted in (bringing/sending)) the following weapons: _____ <insert description of each weapon when multiple items alleged>. You may not find the defendant guilty unless all of you agree that the People have proved that the defendant (brought/sent/ [or] assisted in (bringing/ sending)) at least one of these weapons and you all agree on which weapon (he/she) (brought/sent/ [or] assisted in (bringing/sending)).]

<Defense: Conduct Authorized>

[The defendant is not guilty of this offense if (he/she) was authorized to (bring/send) a weapon into the penal institution by (law[,]/ [or] a person in charge of the penal institution[,]/ [or] an officer of the penal institution empowered by the person in charge of the institution to give such authorization). The People have the burden of proving beyond a reasonable doubt that the defendant was not authorized to (bring/send) the weapon into the institution. If the People have not met this burden, you must find the defendant not guilty of this offense.]

BENCH NOTES***Instructional Duty***

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

If the prosecution alleges under a single count that the defendant brought or sent multiple weapons into the institution, the court has a **sua sponte** duty to instruct on unanimity. (See *People v. Wolfe* (2003) 114 Cal.App.4th 177, 184–185 [7 Cal.Rptr.3d 483]; *People v. Rowland* (1999) 75 Cal.App.4th 61, 65 [88 Cal.Rptr.2d 900].) Give the bracketed paragraph that begins with “The People allege that the defendant (brought/sent/ [or] assisted in (bringing/sending)),” inserting the items alleged.

If the defendant is charged with a felony for bringing or sending tear gas or a tear gas weapon into a penal institution resulting in the release of tear gas (Pen. Code, § 4574(b)), the court has a **sua sponte** duty to instruct the jury on this additional allegation. The court should give the jury an additional instruction on this issue and a verdict form on which the jury may indicate if this fact has or has not been proved.

Note that the definition of “deadly weapon” in the context of Penal Code section 4574 differs from the definition given in other instructions. (*People v. Martinez* (1998) 67 Cal.App.4th 905, 909 [79 Cal.Rptr.2d 334].)

If there is sufficient evidence of a harmless use for the object, give the bracketed sentence that begins with “You may consider evidence that the object could be used in a harmless way” (*People v. Savedra* (1993) 15 Cal.App.4th 738, 743–744 [19 Cal.Rptr.2d 115].)

If there is sufficient evidence that the defendant was authorized to bring or send the weapon, give the bracketed word “unlawfully” in element 1. Give also the bracketed paragraph headed “Defense: Conduct Authorized.”

AUTHORITY

- Elements. Pen. Code, § 4574(a), (b) & (c).
- Firearm Defined. Pen. Code, § 16520.
- Explosive Defined. Health & Saf. Code, § 12000.
- Tear Gas Defined. Pen. Code, § 17240.
- Tear Gas Weapon Defined. Pen. Code, § 17250.
- Deadly Weapon Defined. *People v. Martinez* (1998) 67 Cal.App.4th 905, 909 [79 Cal.Rptr.2d 334].
- Jail Defined. *People v. Carter* (1981) 117 Cal.App.3d 546, 550 [172 Cal.Rptr. 838].
- Knowledge of Nature of Object. See *People v. Rubalcava* (2000) 23 Cal.4th 322, 331–332 [96 Cal.Rptr.2d 735, 1 P.3d 52]; *People v. James* (1969) 1 Cal.App.3d 645, 650 [81 Cal.Rptr. 845].

- Knowledge of Location as Penal Institution. *People v. Seale* (1969) 274 Cal.App.2d 107, 111 [78 Cal.Rptr. 811].
- Harmless Use. *People v. Savedra* (1993) 15 Cal.App.4th 738, 743–744 [19 Cal.Rptr.2d 115]; *People v. Martinez* (1998) 67 Cal.App.4th 905, 910–913 [79 Cal.Rptr.2d 334].
- Unanimity. *People v. Wolfe* (2003) 114 Cal.App.4th 177, 184–185 [7 Cal.Rptr.3d 483].
- Firearm Need Not Be Operable. *People v. Talkington* (1983) 140 Cal.App.3d 557, 563 [189 Cal.Rptr. 735].
- “Adjacent to” and “Grounds” Not Vague. *People v. Seale* (1969) 274 Cal.App.2d 107, 114–115 [78 Cal.Rptr. 811].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Governmental Authority, § 100.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 85, *Submission to Jury and Verdict*, § 85.02[2][a][i] (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 144, *Crimes Against Order*, § 144.01 (Matthew Bender).

LESSER INCLUDED OFFENSES

- Attempt to Bring or Send Weapon Into Penal Institution. Pen. Code, §§ 664, 4574(a), (b), or (c); *People v. Carter* (1981) 117 Cal.App.3d 546, 548 [172 Cal.Rptr. 838].

If the defendant is charged with bringing or sending tear gas or a tear gas weapon into a penal institution, the offense is a misdemeanor unless tear gas was released in the institution. (Pen. Code, § 4574(b) & (c).) If the defendant is charged with a felony, then the misdemeanor offense is a lesser included offense. The court must provide the jury with a verdict form on which the jury will indicate if the prosecution has proved that tear gas was released. If the jury finds that this has not been proved, then the offense should be set at a misdemeanor.

RELATED ISSUES

Inmate Transferred to Mental Hospital

A prison inmate transferred to a mental hospital for treatment pursuant to Penal Code section 2684 is not “under the custody of prison officials.” (*People v. Superior Court (Ortiz)* (2004) 115 Cal.App.4th 995, 1002 [9 Cal.Rptr.3d 745].)

**2748. Possession of Controlled Substance or Paraphernalia in
Penal Institution (Pen. Code, § 4573.6)**

The defendant is charged [in Count _____] with possessing (_____ *<insert type of controlled substance>*, a controlled substance/an object intended for use to inject or consume controlled substances), in a penal institution [in violation of Penal Code section 4573.6].

To prove that the defendant is guilty of this crime, the People must prove that:

1. The defendant [unlawfully] possessed (a controlled substance/an object intended for use to inject or consume controlled substances) in a penal institution [or on the grounds of a penal institution];

2. The defendant knew of the (substance's/object's) presence;

[AND]

3. The defendant knew (of the substance's nature or character as a controlled substance/that the object was intended to be used for injecting or consuming controlled substances)(;/.)

<Give elements 4 and 5 if defendant is charged with possession of a controlled substance, not possession of paraphernalia.>

<If the controlled substance is not listed in the schedules set forth in sections 11054 through 11058 of the Health and Safety Code, give paragraph 4B and the definition of analog substance below instead of paragraph 4A.>

- [4A. The controlled substance was _____ *<insert type of controlled substance>*;

- 4B. The controlled substance was an analog of _____ *<insert type of controlled substance>*;

AND

5. The controlled substance was a usable amount.]

[In order to prove that the defendant is guilty of this crime, the People must prove that _____ *<insert name of analog drug>* is an analog of _____ *<insert type of controlled substance>*. An analog of a controlled substance:

- [1. Has a chemical structure substantially similar to the structure of a controlled substance(./;)]

[OR]

[(2/1). Has, is represented as having, or is intended to have a stimulant, depressant, or hallucinogenic effect on the central nervous system substantially similar to or greater than the effect of a controlled substance.]]

A *penal institution* is a (state prison[,]/ [or] prison camp or farm[,]/ [or] (county/ [or] city) jail[,]/ [or] county road camp[,]/ [or] county farm[,]/ [or] place where prisoners of the state prison are located under the custody of prison officials, officers, or employees/ [or] place where prisoners or inmates are being held under the custody of a (sheriff[,]/ [or] chief of police[,]/ [or] peace officer[,]/ [or] probation officer).

[A *usable amount* is a quantity that is enough to be used by someone as a controlled substance. Useless traces [or debris] are not usable amounts. On the other hand, a usable amount does not have to be enough, in either amount or strength, to affect the user.]

[The People do not need to prove that the defendant knew which specific controlled substance (he/she) possessed.]

[An object is *intended to be used* for injecting or consuming controlled substances if the defendant (1) actually intended it to be so used, or (2) should have known, based on the item's objective features, that it was intended for such use.]

[Two or more people may possess something at the same time.]

[A person does not have to actually hold or touch something to possess it. It is enough if the person has (control over it/ [or] the right to control it), either personally or through another person.]

[Agreeing to buy a controlled substance does not, by itself, mean that a person has control over that substance.]

[The People allege that the defendant possessed the following items:

_____ *<insert description of each controlled substance or all paraphernalia when multiple items alleged>*. You may not find the defendant guilty unless all of you agree that the People have proved that the defendant possessed at least one of these items and you all agree on which item (he/she) possessed.]

<A. Defense: Prescription>

[The defendant is not guilty of unlawfully possessing _____ *<insert type of controlled substance>* if (he/she) had a valid prescription for that substance written by a physician, dentist, podiatrist, or veterinarian licensed to practice in California. The People have the burden of proving beyond a reasonable doubt that the defendant did not have a valid prescription. If the People have not met this burden, you must find the defendant not guilty of possessing a controlled substance.]

<B. Defense: Conduct Authorized>

[The defendant is not guilty of this offense if (he/she) was authorized to possess the (substance/item) by (the rules of the (Department of Corrections/prison/jail/institution/camp/farm/place)/ [or] the specific authorization of the (warden[,]/ [or] superintendent[,]/ [or] jailer[,]/ [or] [other] person in charge of the (prison/jail/institution/camp/farm/place)). The People have the burden of proving beyond a reasonable doubt that the defendant was not authorized to possess the (substance/item). If the People have not met this burden, you must find the defendant not guilty of this offense.]

New January 2006; Revised October 2010, February 2014, September 2017, September 2018

BENCH NOTES***Instructional Duty***

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

If the defendant is charged with possessing a controlled substance, give elements 1 through 5. If the defendant is charged with possession of paraphernalia, give elements 1 through 3 only.

If the prosecution alleges under a single count that the defendant possessed multiple items, the court has a **sua sponte** duty to instruct on unanimity. (See *People v. Wolfe* (2003) 114 Cal.App.4th 177, 184–185 [7 Cal.Rptr.3d 483]; *People v. Rowland* (1999) 75 Cal.App.4th 61, 65 [88 Cal.Rptr.2d 900].) Give the bracketed paragraph that begins with “The People allege that the defendant possessed,” inserting the items alleged.

Give the bracketed sentence defining “intended to be used” if there is an issue over whether the object allegedly possessed by the defendant was drug paraphernalia. (See *People v. Gutierrez* (1997) 52 Cal.App.4th 380, 389 [60 Cal.Rptr.2d 561].)

The prescription defense is codified in Health & Safety Code sections 11350 and 11377. This defense does apply to a charge of possession of a controlled substance in a penal institution. (*People v. Fenton* (1993) 20 Cal.App.4th 965, 969 [25 Cal.Rptr.2d 52].) The defendant need only raise a reasonable doubt about whether his possession of the drug was lawful because of a valid prescription. (See *People v. Mower* (2002) 28 Cal.4th 457, 479 [122 Cal.Rptr.2d 326, 49 P.3d 1067].) If there is sufficient evidence of a prescription, give the bracketed “unlawfully” in element 1 and the bracketed paragraph headed “Defense: Prescription.”

If there is sufficient evidence that the defendant was authorized to possess the substance or item, give the bracketed word “unlawfully” in element 1 and the bracketed paragraph headed “Defense: Conduct Authorized.” (*People v. George* (1994) 30 Cal.App.4th 262, 275–276 [35 Cal.Rptr.2d 750]; *People v. Cardenas*

(1997) 53 Cal.App.4th 240, 245–246 [61 Cal.Rptr.2d 583].)

AUTHORITY

- Elements. Pen. Code, § 4573.6; *People v. Palaschak* (1995) 9 Cal.4th 1236, 1242 [40 Cal.Rptr.2d 722, 893 P.2d 717]; *People v. Carrasco* (1981) 118 Cal.App.3d 936, 944–948 [173 Cal.Rptr. 688].
- Knowledge. *People v. Carrasco, supra*, 118 Cal.App.3d at pp. 944–947.
- Usable Amount. *People v. Carrasco, supra*, 118 Cal.App.3d at p. 948.
- Prescription Defense. Health & Saf. Code, §§ 11350, 11377.
- Prescription. Health & Saf. Code, §§ 11027, 11164, 11164.5.
- Persons Authorized to Write Prescriptions. Health & Saf. Code, § 11150.
- Prescription Defense Applies. *People v. Fenton* (1993) 20 Cal.App.4th 965, 969 [25 Cal.Rptr.2d 52].
- Authorization Is Affirmative Defense. *People v. George* (1994) 30 Cal.App.4th 262, 275–276 [35 Cal.Rptr.2d 750]; *People v. Cardenas, supra*, 53 Cal.App.4th at pp. 245–246.
- Jail Defined. *People v. Carter* (1981) 117 Cal.App.3d 546, 550 [172 Cal.Rptr. 838].
- Knowledge of Location as Penal Institution. *People v. Seale* (1969) 274 Cal.App.2d 107, 111 [78 Cal.Rptr. 811].
- “Adjacent to” and “Grounds” Not Vague. *People v. Seale, supra*, 274 Cal.App.2d at pp. 114–115.
- Constructive vs. Actual Possession. *People v. Barnes* (1997) 57 Cal.App.4th 552, 556 [67 Cal.Rptr.2d 162].
- Unanimity. *People v. Wolfe* (2003) 114 Cal.App.4th 177, 184–185 [7 Cal.Rptr.3d 483].
- Definition of Analog Controlled Substance. Health & Saf. Code, § 11401; *People v. Davis* (2013) 57 Cal.4th 353, 357, fn. 2 [159 Cal.Rptr.3d 405, 303 P.3d 1179].
- No Finding Necessary for “Expressly Listed” Controlled Substance. *People v. Davis, supra*, 57 Cal.4th at p. 362, fn. 5.

Secondary Sources

7 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against Public Peace and Welfare, §§ 211–212.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 85, *Submission to Jury and Verdict*, § 85.02[2][a][i] (Matthew Bender).

5 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 94, *Prisoners’ Rights*, § 94.04 (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 145,

Narcotics and Alcohol Offenses, § 145.01 (Matthew Bender).

RELATED ISSUES

Inmate Transferred to Mental Hospital

A prison inmate transferred to a mental hospital for treatment under Penal Code section 2684 is not “under the custody of prison officials.” (*People v. Superior Court (Ortiz)* (2004) 115 Cal.App.4th 995, 1002 [9 Cal.Rptr.3d 745].) However, the inmate is “held under custody by peace officers within the facility.” (*Id.* at p. 1003.) Thus, Penal Code section 4573.6 does apply. (*Ibid.*)

Use of Controlled Substance Insufficient to Prove Possession

“‘[P]ossession,’ as used in that section, does not mean ‘use’ and mere evidence of use (or being under the influence) of a proscribed substance cannot circumstantially prove its ‘possession.’ ” (*People v. Spann* (1986) 187 Cal.App.3d 400, 408 [232 Cal.Rptr. 31] [italics in original]; see also *People v. Carrasco*, *supra*, 118 Cal.App.3d at p. 947.)

Posting of Prohibition

Penal Code section 4573.6 requires that its “prohibitions and sanctions” be posted on the grounds of the penal institution. (Pen. Code, § 4573.6.) However, that requirement is not an element of the offense, and the prosecution is not required to prove compliance. (*People v. Gutierrez* (1997) 52 Cal.App.4th 380, 389 [60 Cal.Rptr.2d 561]; *People v. Cardenas*, *supra*, 53 Cal.App.4th at p. 246.)

Possession of Multiple Items at One Time

“[C]ontemporaneous possession in a state prison of two or more discrete controlled substances . . . at the same location constitutes but one offense under Penal Code section 4573.6.” (*People v. Rouser* (1997) 59 Cal.App.4th 1065, 1067 [69 Cal.Rptr.2d 563].)

Administrative Punishment Does Not Bar Criminal Action

“The protection against multiple punishment afforded by the Double Jeopardy Clause . . . is not implicated by prior prison disciplinary proceedings” (*Taylor v. Hamlet* (N.D. Cal. 2003) 2003 U.S. Dist. LEXIS 19451; see also *People v. Ford* (1959) 175 Cal.App.2d 37, 39 [345 P.2d 354] [Pen. Code, § 654 not implicated].)

Medical Use of Cannabis

The medical cannabis defense provided by Health and Safety Code section 11362.5 is not available to a defendant charged with violating Penal Code section 4573.6. (*Taylor v. Hamlet*, *supra*, 2003 U.S. Dist. LEXIS 19451.) However, the common law defense of medical necessity may be available. (*Ibid.*)

2749–2759. Reserved for Future Use

(iv) Escape

2760. Escape (Pen. Code, § 4532(a)(1) & (b)(1))

The defendant is charged [in Count _____] with (escape/ [or] attempting to escape) [in violation of Penal Code section 4532].

To prove that the defendant is guilty of this crime, the People must prove that:

1. The defendant was a prisoner who had been ((arrested and booked for[,]/ [or] charged with[,]/ [or] convicted of) a (misdemeanor/felony)/committed by order of the juvenile court to an adult facility);

<Alternative 2A—confined in penal institution>

- [2. The defendant was confined in (a/an) (county jail/city jail/prison/ industrial farm/industrial road camp);]

<Alternative 2B—engaged in county work>

- [2. The defendant was working on (a county road/ [or other] county work) as an inmate;]

<Alternative 2C—lawful custody>

- [2. The defendant was in the lawful custody of (an officer/ [or] a person);]

<Alternative 2D—work furlough>

- [2. The defendant was confined in (a/an) (county jail/city jail/prison/ industrial farm/industrial road camp) but was authorized to be away from the place of confinement in connection with a work furlough program;]

<Alternative 2E—temporary release>

- [2. The defendant was confined in (a/an) (county jail/city jail/prison/ industrial farm/industrial road camp) but was away from the place of confinement in connection with an authorized temporary release;]

<Alternative 2F—home detention>

- [2. The defendant was a participant in a home detention program;]

<Alternative 2G—confined under Pen. Code, § 4011.9>

- [2. The defendant was confined as an inmate in a hospital for treatment even though no guard was present to detain the defendant;]

AND

<Alternative 3A—confined in penal institution>

[3. The defendant (escaped/ [or] attempted to escape) from the (jail/prison/farm/camp).]

<Alternative 3B—engaged in county work>

[3. The defendant (escaped/ [or] attempted to escape) from the custody of the (officer/ [or] person in charge of (him/her)) while engaged in work at, or going to or returning from, the county work site.]

<Alternative 3C—lawful custody>

[3. The defendant (escaped/ [or] attempted to escape) from the custody of the (officer/ [or] person) who had lawful custody of the defendant.]

<Alternative 3D—work furlough>

[3. The defendant (escaped/ [or] attempted to escape) from the (jail/prison/farm/camp) by failing to return to the place of confinement.]

<Alternative 3E—temporary release>

[3. The defendant (escaped/ [or] attempted to escape) from the (jail/prison/farm/camp) by failing to return to the place of confinement.]

<Alternative 3F—home detention>

[3. The defendant (escaped/ [or] attempted to escape) from the place of confinement in the home detention program.]

<Alternative 3G—confined under Pen. Code, § 4011.9>

[3. The defendant (escaped/ [or] attempted to escape) from the place of hospital confinement.]

[A person has been *booked* for a (misdemeanor/felony) if he or she has been taken to a law enforcement office where an officer or employee has recorded the arrest and taken the person’s fingerprints and photograph.]

[A person has been *charged* with a (misdemeanor/felony) if a formal complaint, information, or indictment has been filed in court alleging that the person committed a crime.]

***Escape* means the unlawful departure of a prisoner from the physical limits of his or her custody. [It is not necessary for the prisoner to have left the outer limits of the institution’s property. However, the prisoner**

must breach a wall or fence marking the security perimeter of the correctional facility. It is not sufficient for the prisoner to be merely outside the particular area within the facility where he or she is permitted to be.]

[A prisoner also *escapes* if he or she willfully fails to return to his or her place of confinement within the period that he or she was authorized to be away from that place of confinement. Someone commits an act *willfully* when he or she does it willingly or on purpose.]

[A prisoner is in the *lawful custody* of (an officer/ [or] a person) if the (officer/ [or] person), acting under legal authority, physically restrains or confines the prisoner so that the prisoner is significantly deprived of his or her freedom of movement or the prisoner reasonably believes that he or she is significantly deprived of his or her freedom of movement.]

New January 2006; Revised August 2013

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

In elements 2 and 3, select the location where the defendant was allegedly confined or the program that the defendant allegedly escaped from.

In the definition of escape, give the bracketed sentence if there is an issue as to whether the defendant went far enough to constitute an escape. (See *People v. Lavaie* (1999) 70 Cal.App.4th 456, 459–461 [82 Cal.Rptr.2d 719].)

Give the bracketed paragraph on willful failure to return if appropriate based on the evidence.

Give the bracketed paragraph defining lawful custody if there is an issue as to whether the defendant was in lawful custody. (*People v. Nicholson* (2004) 123 Cal.App.4th 823 [20 Cal.Rptr.3d 476].)

If the defendant is charged with attempt, give CALCRIM No. 460, *Attempt Other Than Attempted Murder*. (*People v. Gallegos* (1974) 39 Cal.App.3d 512, 517 [114 Cal.Rptr. 166].)

If the prosecution alleges escape with force or violence (Pen. Code, § 4532(a)(2) or (b)(2)), give CALCRIM No. 2761, *Escape By Force or Violence*. (*People v. Gallegos, supra*, 39 Cal.App.3d at pp. 518–519.)

Defenses—Instructional Duty

If there is sufficient evidence of necessity, the court has a **sua sponte** duty to give CALCRIM No. 2764, *Escape: Necessity Defense*. (*People v. Condley* (1977) 69 Cal.App.3d 999, 1008–1013 [138 Cal.Rptr. 515]; *People v. Lovercamp* (1974) 43 Cal.App.3d 823, 831–832 [118 Cal.Rptr. 110].)

AUTHORITY

- Elements. Pen. Code, § 4532(a)(1) & (b)(1).
- Specific Intent Not an Element of Completed Escape. *People v. George* (1980) 109 Cal.App.3d 814, 819 [167 Cal.Rptr. 603].
- Attempt to Escape—Must Instruct on Direct Act and Specific Intent. *People v. Gallegos* (1974) 39 Cal.App.3d 512, 517 [114 Cal.Rptr. 166].
- Escape Defined. *People v. Lavaie* (1999) 70 Cal.App.4th 456, 459–461 [82 Cal.Rptr.2d 719].
- Arrested Defendant Must Be Booked Before Statute Applies. *People v. Diaz* (1978) 22 Cal.3d 712, 716–717 [150 Cal.Rptr. 471, 586 P.2d 952]; see also *People v. Trotter* (1998) 65 Cal.App.4th 965, 967, 971 [76 Cal.Rptr.2d 898].
- Arrest of Probationer—Booking Not Required. *People v. Cisneros* (1986) 179 Cal.App.3d 117, 120–123 [224 Cal.Rptr. 452].
- Arrest of Parolee—Booking Not Required. *People v. Nicholson* (2004) 123 Cal.App.4th 823, 830 [20 Cal.Rptr.3d 476].
- Must Be Confined in Adult Penal Institution. *People v. Rackley* (1995) 33 Cal.App.4th 1659, 1668 [40 Cal.Rptr.2d 49].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against Governmental Authority, §§ 86–102.

1 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 11, *Arrest*, §§ 11.02, 11.06[3] (Matthew Bender).

3 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 73, *Defenses and Justifications*, § 73.05 (Matthew Bender).

5 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 94, *Prisoners' Rights*, § 94.20[2] (Matthew Bender).

LESSER INCLUDED OFFENSES

Attempted escape is not a lesser included offense of escape. (*People v. Bailey* (2012) 54 Cal.4th 740, 748–752 [143 Cal.Rptr.3d 647, 279 P.3d 1120]).

RELATED ISSUES***Violating Work Furlough Conditions***

In order for an inmate assigned to work furlough to violate Penal Code section 4532, the inmate must “willfully” fail to return on time. (*Yost v. Superior Court* (1975) 52 Cal.App.3d 289, 292 [125 Cal.Rptr. 74] [defendant who was arrested on other charges on his way back to camp did not willfully fail to return].) If the defendant merely violates conditions of the work furlough release, that conduct falls under Penal Code section 1208, not section 4532. (*Id.* at p. 295.)

Defendant Illegally Detained

If a person is detained in custody “without any process, . . . wholly without authority of law,” or “where the judgment was void on its face,” the detention is

illegal and the defendant may “depart” without committing the crime of escape. (*People v. Teung* (1891) 92 Cal. 421, 421–422, 426 [28 P. 577]; *In re Estrada* (1965) 63 Cal.2d 740, 749 [48 Cal.Rptr. 172, 408 P.2d 948].) “But where the imprisonment is made under authority of law and the process is simply irregular in form, or the statute under which he is confined is unconstitutional, the escape is unlawful.” (*In re Estrada, supra*, 63 Cal.2d at p. 749.) Note that this is a narrow exception, one that has not been applied by the courts since the case of *People v. Clark* (1924) 69 Cal.App. 520, 523 [231 P. 590].

2761. Escape by Force or Violence (Pen. Code, § 4532(a)(2) & (b)(2))

The defendant is charged [in Count _____] with (escape/ [or] attempted escape) committed by force or violence [in violation of Penal Code section 4532].

To prove that the defendant is guilty of this crime, the People must prove that:

1. The defendant was ((arrested and booked for[,]/ [or] charged with[,]/ [or] convicted of) a (misdemeanor/felony)/committed by order of the juvenile court to an adult facility);

<Alternative 2A—confined in penal institution>

- [2. The defendant was confined in (a/an) (county jail/city jail/prison/ industrial farm/industrial road camp);]

<Alternative 2B—engaged in county work>

- [2. The defendant was working on (a county road/ [or other] county work) as an inmate;]

<Alternative 2C—lawful custody>

- [2. The defendant was in the lawful custody of (an officer/ [or] a person);]

<Alternative 2D—work furlough>

- [2. The defendant was confined in (a/an) (county jail/city jail/prison/ industrial farm/industrial road camp) but was authorized to be away from the place of confinement in connection with a work furlough program;]

<Alternative 2E—temporary release>

- [2. The defendant was confined in (a/an) (county jail/city jail/prison/ industrial farm/industrial road camp) but was away from the place of confinement in connection with an authorized temporary release;]

<Alternative 2F—home detention>

- [2. The defendant was a participant in a home detention program;]

<Alternative 2G—confined under Pen. Code, § 4011.9>

- [2. The defendant was confined as an inmate in a hospital for treatment even though no guard was present to detain the defendant;]

<Alternative 3A—confined in penal institution>

- [3. The defendant (escaped/ [or] attempted to escape) from the (jail/ prison/farm/camp);]

<Alternative 3B—engaged in county work>

- [3. The defendant (escaped/ [or] attempted to escape) from the custody of the (officer/ [or] person in charge of (him/her)) while engaged in or going to or returning from the county work site;]

<Alternative 3C—lawful custody>

- [3. The defendant (escaped/ [or] attempted to escape) from the custody of the (officer/ [or] person) who had lawful custody of the defendant;]

<Alternative 3D—work furlough>

- [3. The defendant (escaped/ [or] attempted to escape) from the (jail/ prison/farm/camp) by failing to return to the place of confinement;]

<Alternative 3E—temporary release>

- [3. The defendant (escaped/ [or] attempted to escape) from the (jail/ prison/farm/camp) by failing to return to the place of confinement;]

<Alternative 3F—home detention>

- [3. The defendant (escaped/ [or] attempted to escape) from the place of confinement in the home detention program;]

<Alternative 3G—confined under Pen. Code, § 4011.9>

- [3. The defendant (escaped/ [or] attempted to escape) from the place of hospital confinement;]

AND

4. The defendant committed the (escape/ [or] attempted escape) by force or violence.

[A person has been *booked* for a (misdemeanor/felony) if he or she has been taken to a law enforcement office where an officer or employee has recorded the arrest and taken the person's fingerprints and photograph.]

[A person has been *charged* with a (misdemeanor/felony) if a formal complaint, information, or indictment has been filed in court alleging that the person committed a crime.]

Escape means the unlawful departure of a prisoner from the physical

limits of his or her custody. [It is not necessary for the prisoner to have left the outer limits of the institution's property. However, the prisoner must breach a wall or fence marking the security perimeter of the correctional facility. It is not sufficient for the prisoner to be merely outside the particular area within the facility where he or she is permitted to be.]

[A prisoner also *escapes* if he or she willfully fails to return to his or her place of confinement within the period that he or she was authorized to be away from that place of confinement. Someone commits an act *willfully* when he or she does it willingly or on purpose.]

To commit an act *by force or violence* means to wrongfully use physical force against the property or person of another. [To *use force* against a person means to touch the other person in a harmful or offensive manner. The slightest touching can be enough if it is done in a rude or angry way. Making contact with another person, including through his or her clothing, is enough. The touching does not have to cause pain or injury of any kind.]

[The People must prove that the defendant personally used force or violence or aided and abetted another in using force or violence. Mere knowledge that someone else used force or violence is not enough. Instruction[s] _____ <insert instruction numbers; see Bench Notes> explain[s] when a person aids and abets another.]

New January 2006; Revised August 2013

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

In elements 2 and 3, select the location where the defendant was allegedly confined or the program that the defendant allegedly escaped from and use the appropriate alternative paragraphs.

In the definition of escape, give the bracketed sentence if there is an issue as to whether the defendant went far enough to constitute an escape. (See *People v. Lavaie* (1999) 70 Cal.App.4th 456, 459–461 [82 Cal.Rptr.2d 719].)

Give the bracketed paragraph on willful failure to return if appropriate based on the evidence.

In the definition of force or violence, use the bracketed sentences if the prosecution alleges that the defendant used force against a person. (*People v. Lozano* (1987) 192 Cal.App.3d 618, 627 [237 Cal.Rptr. 612] [meaning of “force” in Pen. Code, § 4532 equivalent to simple battery].)

Give the bracketed paragraph that begins with “The People must prove that the

defendant personally” if this is an issue in the case. (*People v. Moretto* (1994) 21 Cal.App.4th 1269, 1278 [26 Cal.Rptr.2d 719].) Give also CALCRIM No. 400, *Aiding and Abetting: General Principles*, and CALCRIM No. 401, *Aiding and Abetting: Intended Crimes*.

If the defendant is charged with attempt, give CALCRIM No. 460, *Attempt Other Than Attempted Murder*. (*People v. Gallegos* (1974) 39 Cal.App.3d 512, 517 [114 Cal.Rptr. 166].)

Defenses—Instructional Duty

If there is sufficient evidence of necessity, the court has a **sua sponte** duty to give CALCRIM No. 2764, *Escape: Necessity Defense*. (*People v. Condley* (1977) 69 Cal.App.3d 999, 1008–1013 [138 Cal.Rptr. 515]; *People v. Lovercamp* (1974) 43 Cal.App.3d 823, 831–832 [118 Cal.Rptr. 110].)

AUTHORITY

- Elements. Pen. Code, § 4532(a)(2) & (b)(2).
- Specific Intent Not an Element of Completed Escape. *People v. George* (1980) 109 Cal.App.3d 814, 819 [167 Cal.Rptr. 603].
- Attempt to Escape—Must Instruct on Direct Act and Specific Intent. *People v. Gallegos* (1974) 39 Cal.App.3d 512, 517 [114 Cal.Rptr. 166].
- Escape Defined. *People v. Lavaie* (1999) 70 Cal.App.4th 456, 459–461 [82 Cal.Rptr.2d 719].
- Force or Violence Defined. *People v. Lozano* (1987) 192 Cal.App.3d 618, 627 [237 Cal.Rptr. 612]; *People v. Bravott* (1986) 183 Cal.App.3d 93, 97 [227 Cal.Rptr. 810].
- Force Includes Damage to Property. *People v. White* (1988) 202 Cal.App.3d 862, 866 [249 Cal.Rptr. 165]; *People v. Bravott* (1986) 183 Cal.App.3d 93, 97 [227 Cal.Rptr. 810].
- Defendant Must Personally Use Force or Aid and Abet Another. *People v. Moretto* (1994) 21 Cal.App.4th 1269, 1278 [26 Cal.Rptr.2d 719].
- Arrested Defendant Must Be Booked Before Statute Applies. *People v. Diaz* (1978) 22 Cal.3d 712, 716–717 [150 Cal.Rptr. 471, 586 P.2d 952]; see also *People v. Trotter* (1998) 65 Cal.App.4th 965, 967, 971 [76 Cal.Rptr.2d 898].
- Arrest of Probationer—Booking Not Required. *People v. Cisneros* (1986) 179 Cal.App.3d 117, 120–123 [224 Cal.Rptr. 452].
- Must Be Confined in Adult Penal Institution. *People v. Rackley* (1995) 33 Cal.App.4th 1659, 1668 [40 Cal.Rptr.2d 49].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against Governmental Authority, §§ 86–102.

1 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 11, *Arrest*,

§ 11.06[3] (Matthew Bender).

3 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 73, *Defenses and Justifications*, § 73.05 (Matthew Bender).

5 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 94, *Prisoners' Rights*, § 94.20[2] (Matthew Bender).

LESSER INCLUDED OFFENSES

Escape carries a more severe penalty if done with force or violence. (Pen. Code, § 4532(a)(2) & (b)(2).) If the defendant is charged with using force or violence, then the escape without force or violence is a lesser included offense. (*People v. Gallegos* (1974) 39 Cal.App.3d 512, 518–519 [114 Cal.Rptr. 166].) Note that the court must instruct on all the elements of escape with force or violence and must then give a separate instruction on the lesser offense, stating all of the elements except force or violence. (*People v. Lozano* (1987) 192 Cal.App.3d 618, 633 [237 Cal.Rptr. 612].) The court may not give the jury a verdict form asking specifically if the element of force or violence has been proved. (*Ibid.*)

RELATED ISSUES

See Related Issues section in CALCRIM No. 2760, *Escape*.

2762. Escape After Remand or Arrest (Pen. Code, § 836.6)

The defendant is charged [in Count _____] with (escape/ [or] attempted escape) following (a remand/an arrest) [in violation of Penal Code section 836.6].

To prove that the defendant is guilty of this crime, the People must prove that:

<Alternative 1A—remanded>

- [1. The defendant was remanded, which means that a (magistrate/ judge) ordered (him/her) placed into the custody of a (sheriff[,]/ [or] marshal[,]/ [or other] (police agency/peace officer));]

<Alternative 1B—arrested>

- [1. The defendant was lawfully arrested by a peace officer and the defendant knew, or reasonably should have known, that (he/she) had been arrested;]

AND

2. The defendant (escaped/ [or] attempted to escape) from the custody of the (sheriff[,]/ marshal[,]/ [or other] (police agency/ peace officer)).

Escape means the unlawful departure from the physical limits of custody.

[A sworn member of _____ <insert name of agency that employs peace officer>, authorized by _____ <insert appropriate section from Pen. Code, § 830 et seq.> to _____ <describe statutory authority>, is a **peace officer**.]

New January 2006

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

If the defendant is charged with a felony for use of force or violence, give CALCRIM No. 2763, *Escape After Remand or Arrest: Force or Violence* with this instruction.

If the defendant is charged with attempt, give CALCRIM No. 460, *Attempt Other Than Attempted Murder*. (*People v. Gallegos* (1974) 39 Cal.App.3d 512, 517 [114 Cal.Rptr. 166].)

If lawfulness of the arrest is an issue, give the appropriate paragraphs from CALCRIM No. 2670, *Lawful Performance: Peace Officer*.

The jury must determine whether the person who arrested the defendant is a peace officer. (*People v. Brown* (1988) 46 Cal.3d 432, 444–445 [250 Cal.Rptr. 604, 758 P.2d 1135].) The court may instruct the jury on the appropriate definition of “peace officer” from the statute (e.g., “a Garden Grove Regular Police Officer and a Garden Grove Reserve Police Officer are peace officers”). (*Ibid.*) However, the court may not instruct the jury that the person was a peace officer as a matter of law (e.g., “Officer Reed was a peace officer”). (*Ibid.*)

Defenses—Instructional Duty

If there is sufficient evidence of necessity, the court has a **sua sponte** duty to give CALCRIM No. 2764, *Escape: Necessity Defense*. (*People v. Condley* (1977) 69 Cal.App.3d 999, 1008–1013 [138 Cal.Rptr. 515]; *People v. Lovercamp* (1974) 43 Cal.App.3d 823, 831–832 [118 Cal.Rptr. 110].)

AUTHORITY

- Elements. Pen. Code, § 836.6
- Specific Intent Not an Element of Completed Escape. *People v. George* (1980) 109 Cal.App.3d 814, 819 [167 Cal.Rptr. 603].
- Attempt to Escape—Must Instruct on Direct Act and Specific Intent. *People v. Gallegos* (1974) 39 Cal.App.3d 512, 517 [114 Cal.Rptr. 166].
- Escape Defined. *People v. Lavaie* (1999) 70 Cal.App.4th 456, 459–461 [82 Cal.Rptr.2d 719].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Governmental Authority, § 97.

1 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 11, *Arrest*, §§ 11.02, 11.06[3] (Matthew Bender).

3 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 73, *Defenses and Justifications*, § 73.05 (Matthew Bender).

LESSER INCLUDED OFFENSES

Escape after remand or arrest is a misdemeanor unless the defendant used force or violence and caused serious bodily injury to a peace officer. (Pen. Code, § 836.6(c).) If the defendant is charged with the felony, then the misdemeanor is a lesser included offense. (See *People v. Gallegos* (1974) 39 Cal.App.3d 512, 518–519 [114 Cal.Rptr. 166].) The court must provide the jury with a verdict form on which the jury will indicate if the additional elements have or have not been proved. If the jury finds that these elements have not been proved, then the offense should be set at a misdemeanor.

**2763. Escape After Remand or Arrest: Force or Violence (Pen.
Code, § 836.6)**

If you find the defendant guilty of (escape/ [or] attempted escape) following (remand/arrest), you must then decide whether the People have proved the additional allegation that the defendant used force or violence and caused serious bodily injury to a peace officer.

To prove this allegation, the People must prove that:

1. The defendant committed the (escape/ [or] attempted escape) by force or violence;

AND

2. The defendant caused serious bodily injury to a peace officer.

As used here, *using force or violence* means the wrongful application of physical force against the person of another. To *use force* against a person means to touch the other person in a harmful or offensive manner.

[The People must prove that the defendant personally used force or violence or aided and abetted another in using force or violence. Mere knowledge that someone else used force or violence is not enough.

Instruction[s] _____ <insert instruction numbers; see Bench Notes> explain[s] when a person aids and abets another.]

A *serious bodily injury* means a serious impairment of physical condition. Such an injury may include[, but is not limited to]: (loss of consciousness/ concussion/ bone fracture/ protracted loss or impairment of function of any bodily member or organ/ a wound requiring extensive suturing/ [and] serious disfigurement).

[An act causes bodily injury to another person if the injury is the direct, natural, and probable consequence of the act and the injury would not have happened without the act. A *natural and probable consequence* is one that a reasonable person would know is likely to happen if nothing unusual intervenes. In deciding whether a consequence is natural and probable, consider all of the circumstances established by the evidence.]

[There may be more than one cause of injury. An act causes bodily injury to another person only if it is a substantial factor in causing the injury. A *substantial factor* is more than a trivial or remote factor. However, it does not need to be the only factor that causes the injury.]

A sworn member of _____ <insert name of agency that employs peace officer>, authorized by _____ <insert appropriate section from Pen. Code, § 830 et seq.> to _____ <describe statutory authority>, is a peace officer.

The People have the burden of proving beyond a reasonable doubt that the defendant used force or violence and caused serious bodily injury to a peace officer. If the People have not met this burden, you must find that this allegation has not been proved.

New January 2006

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the sentencing factor.

This instruction **must** be given with CALCRIM No. 2762, *Escape After Remand or Arrest*. The court must provide the jury with a verdict form on which the jury will indicate if the prosecution has or has not been proved the additional allegation of the use of force.

If causation is at issue, the court has a **sua sponte** duty to instruct on proximate cause. (*People v. Bernhardt* (1963) 222 Cal.App.2d 567, 590–591 [35 Cal.Rptr. 401].) If the evidence indicates that there was only one cause of injury, the court should give the “direct, natural, and probable” language in the first bracketed paragraph on causation. If there is evidence of multiple causes of injury, the court should also give the “substantial factor” instruction in the second bracketed paragraph on causation. (See *People v. Autry* (1995) 37 Cal.App.4th 351, 363 [43 Cal.Rptr.2d 135]; *People v. Pike* (1988) 197 Cal.App.3d 732, 746–747 [243 Cal.Rptr. 54].)

Give the bracketed paragraph that begins with “The People must prove that the defendant personally” if this is an issue in the case. (*People v. Moretto* (1994) 21 Cal.App.4th 1269, 1278 [26 Cal.Rptr.2d 719].) Give also CALCRIM No. 400, *Aiding and Abetting: General Principles*, and CALCRIM No. 401, *Aiding and Abetting: Intended Crimes*.

The jury must determine whether the person who arrested the defendant is a peace officer. (*People v. Brown* (1988) 46 Cal.3d 432, 444–445 [250 Cal.Rptr. 604, 758 P.2d 1135].) The court may instruct the jury on the appropriate definition of “peace officer” from the statute (e.g., “a Garden Grove Regular Police Officer and a Garden Grove Reserve Police Officer are peace officers”). (*Ibid.*) However, the court may not instruct the jury that the person was a peace officer as a matter of law (e.g., “Officer Reed was a peace officer”). (*Ibid.*)

AUTHORITY

- Enhancement. Pen. Code, § 836.6.
- Force or Violence Defined. *People v. Lozano* (1987) 192 Cal.App.3d 618, 627 [237 Cal.Rptr. 612]; *People v. Bravott* (1986) 183 Cal.App.3d 93, 97 [227 Cal.Rptr. 810].
- Defendant Must Personally Use Force or Aid and Abet Another. *People v.*

Moretto (1994) 21 Cal.App.4th 1269, 1278 [26 Cal.Rptr.2d 719].

- Serious Bodily Injury Defined. Pen. Code, § 243(f)(4); *People v. Taylor* (2004) 118 Cal.App.4th 11, 25, fn. 4 [12 Cal.Rptr.3d 693].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Governmental Authority, § 97.

1 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 11, *Arrest*, §§ 11.02, 11.06[3] (Matthew Bender).

3 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 73, *Defenses and Justifications*, § 73.05 (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 140, *Challenges to Crimes*, § 140.04 (Matthew Bender).

2764. Escape: Necessity Defense

If you conclude that the defendant (escaped/ [or] attempted to escape), that conduct was not illegal if the defendant can prove the defense of necessity. In order to establish this defense, the defendant must prove that:

1. The defendant was faced with a specific threat of (death[,]/ [or] forcible sexual attack[,]/ [or] substantial bodily injury) in the immediate future;
2. (There was no time for the defendant to make a complaint to the authorities/ [or] (There/there) was a history of complaints that were not acted on, so that a reasonable person would conclude that any additional complaints would be ineffective);
3. There was no time or opportunity to seek help from the courts;
4. The defendant did not use force or violence against prison personnel or other people in the escape [other than the person who was the source of the threatened harm to the defendant];

AND

5. The defendant immediately reported to the proper authorities when (he/she) had attained a position of safety from the immediate threat.

The defendant has the burden of proving this defense by a preponderance of the evidence. This is a different standard of proof from proof beyond a reasonable doubt. To meet the burden of proof by a preponderance of the evidence, the defendant must prove that it is more likely than not that each of the five listed items is true.

New January 2006

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the defense of necessity if there is sufficient evidence to raise a reasonable doubt. (*People v. Condley* (1977) 69 Cal.App.3d 999, 1008–1013 [138 Cal.Rptr. 515]; *People v. Lovercamp* (1974) 43 Cal.App.3d 823, 831–832 [118 Cal.Rptr. 110].)

AUTHORITY

- Escape—Necessity Defense. *People v. Condley* (1977) 69 Cal.App.3d 999, 1008–1013 [138 Cal.Rptr. 515]; *People v. Lovercamp* (1974) 43 Cal.App.3d 823, 831–832 [118 Cal.Rptr. 110].

Secondary Sources

1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Defenses, § 53.

3 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 73, *Defenses and Justifications*, § 73.05 (Matthew Bender).

5 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 94, *Prisoners' Rights*, § 94.20[2] (Matthew Bender).

J. MISAPPROPRIATION OF PUBLIC MONEY

2765. Misappropriation of Public Money (Pen. Code § 424(a)(1–7))

The defendant is charged [in Count _____] with misappropriating public money [in violation of Penal Code section 424(a)(_____) *<insert correct paragraph>*].

To prove that the defendant is guilty of this crime, the People must prove that:

1. The defendant was responsible for receiving, safekeeping, transferring or distributing public money;

[AND]

2. The defendant, while responsible for receiving, safekeeping, transferring or distributing public money:

<select the element that corresponds to the paragraph of Pen. Code § 424(a) with which defendant is charged>

- <(a)(1)>* [took some of that money for (his/her) own or someone else's use without legal authority;]
- <(a)(2)>* [loaned, made a profit from, or used some of that money without legal authority;]
- <(a)(3)>* [knowingly kept a false account or made a false entry or erasure in any account of the money.]
- <(a)(4)>* [fraudulently changed, falsified, hid, destroyed, or obliterated an accounting of that money.]
- <(a)(5)>* [willfully refused or failed to disburse, on demand, any public money in (his/her) control in response to a draft, order, or warrant drawn upon that money by competent authority;]
- <(a)(6)>* [willfully failed to transfer any public money when the transfer was required by law;]
- <(a)(7)>* [willfully failed or refused to disburse any money that (he/she) had received to a person legally authorized to receive that money, despite having a legal duty to do so;]

<give element 3 when instructing on Pen. Code § 424(a)(1), (a)(2), (a)(5), (a)(6), (a)(7)>

[AND]

3. When the defendant did so, (he/she) (knew that (he/she) was not

following the law on receiving, safekeeping, transferring or distributing public money or was acting without legal authority/ [or] was criminally negligent in failing to know the legal requirements for or restrictions on (his/her) conduct).]

A person who is *responsible for* public money only needs to have some control over the money. That control does not need to be a major part of that person's job.

[*Criminal negligence* involves more than ordinary carelessness, inattention, or mistake in judgment. A person acts with criminal negligence when the way he or she acts is so different from the way an ordinarily careful person would act in the same situation that his or her act amounts to disregard for the consequences of that act.]

[A person acts *fraudulently* when he or she makes a false statement, misrepresents information, hides the truth, or otherwise does something with the intent to deceive.]

[The term *public money* includes all funds, bonds, and evidence of indebtedness received or held by state, county, district, city, town, or public agency officers in their official capacity. It also includes money received from selling bonds or other evidence of indebtedness authorized by the legislative body of any city, county, district, or public agency.]

[A person commits an act *willfully* when he or she does it willingly or on purpose.]

New March 2018

BENCH NOTES

Instructional Duty

The court has a *sua sponte* to give this instruction defining the elements of the crime.

AUTHORITY

- Definition of Public Funds/Moneys. Pen. Code, §§ 424(b), 426.
- Definition of Responsible for/Charged With. *People v. Groat* (1993) 19 Cal.App.4th 1228, 1232 [24 Cal.Rptr.2d 15].
- Definition of Fraudulent Behavior. *People v. Pugh* (2002) 104 Cal.App.4th 66, 72 [127 Cal.Rptr.2d 770].
- Criminal Negligence Requirement. *Stark v. Superior Court* (2011) 52 Cal.4th 368, 399 [128 Cal.Rptr.3d 611, 257 P.3d 41].

2766–2799. Reserved for Future Use